

Michigan Journal of International Law

Volume 27 | Issue 1

2005

Article 9 of the Constitution of Japan and the Use of Procedural and Substantive Heuristics for Consensus

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Recommended Citation

Mark A. Chinen, *Article 9 of the Constitution of Japan and the Use of Procedural and Substantive Heuristics for Consensus*, 27 MICH. J. INT'L L. 55 (2005).

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ARTICLE 9 OF THE CONSTITUTION OF JAPAN AND THE USE OF PROCEDURAL AND SUBSTANTIVE HEURISTICS FOR CONSENSUS†

Mark A. Chinen*

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* Associate Professor, Seattle University School of Law. I would like to express my appreciation to Veronica Taylor, John Haley, Shigenori Matsui, and Robert Menanteaux for their comments on earlier drafts of this Article. The draft also benefited from comments received from the participants in the Japanese Law Research Workshop held at the University of Washington School of Law, October 21–23, 2005. Thanks also to Robert Britt, Japanese law specialist at the University of Washington, for guiding me through the Japanese law collection there, and to Charity Anastasio and Jeffrey Leeper for their research assistance and comments on earlier drafts. All errors are my own.

I. INTRODUCTION

Article 9 of the Constitution of Japan has stirred controversy since the Constitution went into effect in 1947. The provision can be interpreted as prohibiting Japan from using armed force even in self-defense, but over time Japan has developed a significant military force that has expanded in both strength and reach. This expansion has sparked intense debate about whether or not Japan is in violation of Article 9, and this debate has raised broader questions about the meaning and vitality of constitutionalism in Japan. Such controversies have led to calls for revising Article 9, but no amendments have been made to the Constitution since its adoption. In 2000, however, the Diet established constitutional research commissions in both the House of Representatives and the House of Councillors, which have considered all aspects of the Constitution, including the possibility of its revision. The commissions' work was completed in spring 2005, with each commission issuing a final report to the Diet.¹ The political parties are now considering draft amendments. Formal amendments will be introduced and debated in the Diet and, assuming consensus is reached, put to a national referendum. Some speculate that the process will not be completed for several more years, if ever, but no matter the outcome, these developments represent an important chapter in Japanese constitutional history in which an amended Article 9 is a real possibility.

My purpose is to examine the revision debates through the lens of recent scholarship on constitutional decisionmaking to see what lessons might be drawn about constitutionalism in Japan and elsewhere. In Part I, I discuss Article 9's text and interpretation and focus on three controversies: first, Japan's ability to use force to defend itself and the related issue of the constitutionality of the Japan Self Defense Force (SDF); second, Japan's ability to engage in collective self-defense, which impacts the state's security relationship with the United States under the U.S.-Japan Mutual Security Agreement; and finally, Japan's ability to participate in United Nations peacekeeping operations.

In Part II, I discuss scholarship on constitutions as providing heuristics for decisionmaking and consensus-building. I begin with John Elster and Cass Sunstein's view of constitutions as a set of precommitment

1. At present, the reports are available only in Japanese. Shugiin Kenpō Chōsakai [House of Representatives Constitutional Research Commission], *Shugi'in Kenpō Chōsakai Hōkokusho* [House of Representatives Constitutional Research Commission Report] (Apr. 2005) [hereinafter House of Representatives CRC Final Report]; Sangiin Kenpō Chōsakai [House of Councillors Constitutional Research Commission], *Nihonkoku Kenpō ni kan suru Chōsa Hōkokusho* (Apr. 2005) [Report on Research Concerning the Constitution of Japan] [hereinafter House of Councillors CRC Final Report].

strategies.² Elster holds that constitutions function to overcome the problems of emotion and time-inconsistency in decision-making. Sunstein maintains that good constitutions enable societies composed of different deliberative groups to avoid the pitfalls caused by intra-group dynamics and the limited pool of arguments available to any given group, first, by requiring groups to interact with one another and second, by providing opportunities for compromise through what he calls “incompletely theorized agreement.” Drawing on work from J.M. Balkin,³ I argue that precommitment strategies and the concepts that enable incompletely theorized agreement share features common to all heuristic devices: they are cumulative, multifunctional, and recursive, and they lead to unintended results. This complicates the decision-making process of any society, and one result is that any decisions emerging from a constitutional process will themselves share these features.

In Part III, I apply this theory to the process and substance of the Japanese revision debates. First, the debate can be seen as taking place within and among various deliberative groups comprising Japanese society. Second, the formal requirements for amending the Constitution, combined with features in the Japanese political and social landscape, require the various groups to interact with one another before final decisions are made. Third, the cumulative, multifunctional, and recursive features of heuristics are visible in the concepts and arguments being used in the debate on Article 9. These features make agreement challenging because of the various deliberative groups’ familiarity with the arguments being made for and against amendments to Article 9. At the same time, the same concepts could form the basis for incompletely theorized agreement on key issues. Fourth, the net effect of these cultural tools is that possible solutions to the amendment debate will undoubtedly solve some problems, yet raise others.

II. ARTICLE 9

A. *The Text*

Like the rest of the 1947 Constitution, Article 9 is a product of the Occupation.⁴ In the aftermath of the Second World War, the Allies were

2. JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* (2000); CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* (2001).

3. J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* (1998).

4. Original source material on the history of the 1947 Constitution is available on the National Diet Library website. National Diet Library, *Birth of the Constitution of Japan*, <http://www.ndl.go.jp/constitution/e/index.html>. For a history of the constitution, see

determined to ensure that Japan would never again pose a threat to peace and security.⁵ Article 9 provides:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.

In order to accomplish the aim of the preceding paragraph land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.⁶

The Constitution's preamble has language relevant to Article 9, although there is a dispute over whether it has independent legal force, is aspiring in nature, or provides the context for the provisions that follow. There, the Japanese people state they "shall secure for [themselves] and [their] posterity the fruits of peaceful cooperation with all nations . . ." They resolve "never again . . . [to] be visited with the horrors of war through the action of government . . ." And, they "have determined to preserve [their] security and existence, trusting in the justice and faith of peace-loving peoples of the world."⁷

B. Constitutional Controversies

The controversies arising from Article 9 can be grouped into three related issues. The first concerns Japan's right to use force in its defense, which in turn impacts the constitutionality of the Japanese Self Defense Force. The second involves Japan's relationship with the United

LAWRENCE W. BEER & JOHN M. MAKI, FROM IMPERIAL MYTH TO DEMOCRACY (2002); ASHIBE NOBUYOSHI & TAKAHASHI KAZUYUKI, KENPŌ [The Constitution] 22–34 (3d ed. 2002); Hideo Otake, *Two Contrasting Constitutions in the Postwar World: The Making of the Japanese and West German Constitutions in FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY* 43, 44–49 (Yoichi Higuchi ed., 2001) [hereinafter FIVE DECADES OF CONSTITUTIONALISM]; JOHN W. DOWER, EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II 346–404 (1999); KOSEKI SHŌICHI, THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION (Ray A. Moore ed. & trans., 1997).

5. See, e.g., Watanabe Osamu, Remarks before the House of Councillors Constitutional Research Commission, May 7, 2003 in SANGIIN KENPŌ CHŌSAKAI [HOUSE OF COUNCILLORS CONSTITUTIONAL RESEARCH COMMISSION], SANGIIN KENPŌ CHŌSAKAI NI OKERU SANKŌNIN NO KICHŌHATSUGEN [BASIC REMARKS OF EXPERTS BEFORE THE HOUSE OF COUNCILLORS CONSTITUTIONAL RESEARCH COMMISSION] (April 2005) at 278 [hereinafter House of Councillors CRC Remarks of Experts] (arguing the Allies thought it essential for international peace and security that Japan never rearm). For a history of Japanese imperialism in Asia and the Pacific, see W.G. BEASLEY, JAPANESE IMPERIALISM 1894–1945 (1987).

6. KENPŌ [Constitution], art. 9.

7. *Id.*, preamble.

States in terms of Japan's ability to engage in collective self-defense. The third concerns what role, if any, a Japanese armed force should play in the international security system in general and in UN peacekeeping operations in particular.⁸ These debates center on government interpretations of Article 9 because the courts have largely left it to the political branches to make determinations in this area.⁹

1. Self-Defense and the SDF

Within a few years of ratification and the birth of the Cold War, in response to pressure from the United States and with great controversy, the Japanese government began to interpret Article 9 as allowing Japan to maintain a self-defense force.¹⁰ The Japanese government established the National Police Reserve in 1950 after North Korea invaded South Korea. It became the National Safety Force in 1952 and then changed into the SDF in 1954.¹¹ Beginning in the 1980s, Japan's armed forces grew significantly and began to participate in regional military exercises with the United States.¹²

Today, the SDF has about 240,000 personnel and an annual budget of close to \$50 billion, which is larger in size and spending than Great Britain's armed forces.¹³ Although the SDF is now in its fifth decade, there has been serious debate throughout this period in Japan about whether or not the SDF is constitutional. Article 9, paragraph 2 provides that all "land, sea, and air forces, as well as other war potential, will never be maintained."¹⁴ Two interpretations of Article 9 render the SDF unconstitutional. Under the first, "war," rejected in paragraph 1, means both offensive and defensive war; therefore, under paragraph 2 no forces

8. Another issue is whether it is consistent with Article 9 for the United States to maintain military bases in Japan. Further, Article 9 also raises issues concerning the role Japan can play geographically and militarily in the Pacific. I do not discuss these issues in great detail in this Article.

9. See *infra* notes 146, 237–244, and accompanying text.

10. I discuss some of these developments further in Part III. For a discussion of the Japanese government's interpretation of Article 9, see Yagi Kazuhiro, *Kenpō 9 jō ni kan suru Seifu no Kaishaku ni Tsuite* [Concerning the Government's Interpretation of Article 9 of the Constitution], *JURISTO*, Jan. 1–15, 2004, at 68.

11. *Jeitaihō* [Self-Defense Force Law], Law No. 165 of 1954. Toshihiro Yamauchi, *Constitutional Pacifism: Principle, Reality, and Perspective in FIVE DECADES OF CONSTITUTIONALISM*, *supra* note 4, at 27 (discussing development of the SDF).

12. GLENN D. HOOK & GAVAN MCCORMACK, *JAPAN'S CONTESTED CONSTITUTION* 17 (2001); PETER J. KATZENSTEIN, *CULTURAL NORMS & NATIONAL SECURITY: POLICE AND MILITARY IN POSTWAR JAPAN* 131–38 (1996) (discussing SDF developments from the 1950s to 1996).

13. GlobalSecurity.org, Japan Defense Agency (Boeicho) Japan Self-Defense Force, at <http://www.globalsecurity.org/military/world/japan/jda.htm> (last visited Sept. 27, 2005).

14. *KENPō* art. 9, para. 2.

for either purpose may be maintained.¹⁵ Under the second, “[p]aragraph 1 of Article 9 does not rule out defensive war, but since paragraph 2 forbids the possession of force, even defensive war is forbidden”¹⁶ Japan is to rely on peaceful means, including diplomacy and the international security system, not its own force, when its security is at stake.

Other interpretations of Article 9 permit the use of force in self-defense. The Japanese government first articulated its present position when it established the SDF in 1954.¹⁷ Paragraph 1 does not expressly prohibit force for self-defense, which implies that “war potential” in paragraph 2 means force exceeding a minimum level necessary for self-defense. Anything at or below that level does not constitute war potential, and since the SDF is established for this limited purpose, it does not constitute war potential and therefore is not prohibited by the Constitution.¹⁸ Both sides of the interpretive debate raise a number of arguments with varying degrees of persuasiveness, some of which I discuss more fully in Part III.¹⁹

2. Collective Self-Defense and the U.S.-Japan Security Agreement

The approach used by the Japanese government to justify self-defense and the SDF impacts Japan’s ability to engage in collective self-defense otherwise permitted under Article 51 of the UN Charter. Collective self-defense implies a state may use force to defend another state even though the first state is not being directly attacked. The Japanese government, however, argues that Article 9, paragraph 1 prevents Japan from intervening: by its terms Japan renounces the use of force as a

15. Koseki Shōichi et al., *Peace and Regional Security in the Asia-Pacific*, in HOOK & MCCORMACK, *supra* note 12, at 92, 111.

16. *Id.* See also HIGUCHI YOICHI ET AL., 1 KENPŌ NYŪMON [INTRODUCTION TO THE CONSTITUTION] 64–66 (1992) (arguing Article 9 prohibits the maintenance of armed forces for defensive purposes); Kenneth L. Port, *Article 9 of the Japanese Constitution and the Rule of Law*, 13 CARDOZO J. INT’L & COMP. L. 127, 137–45 (2004) (same); Yamauchi, *supra* note 11, at 30–33 (same). See also D.C.S. Sissons, *The Pacifist Clause of the Japanese Constitution: Legal and Political Problems of Rearmament*, 37 INT’L AFF. 45 (1961) (discussing various interpretations of Article 9).

17. Meeting of the House of Representatives Committee on the Budget of the 21st Diet, Dec. 21, 1954 (statement of Hayashi Shūzō) reprinted in WATANABE OSAMU, KENPŌ “KAISEI” NO SŌTEN [Points of Contention regarding Constitutional Revision] 518, 519–20 (2002) [hereinafter KENPŌ “KAISEI” NO SŌTEN]; House of Councillors CRC Final Report, *supra* note 1, at 79.

18. House of Councillors CRC Final Report, *supra* note 1, at 80. Yamauchi Toshiro criticizes the government’s definition of war potential as circular. YAMAUCHI TOSHIHIRO, KENPŌ TO HEIWA SHUGI [The Constitution and Pacifism] 10 (1998) [Hereinafter KENPŌ TO HEIWA SHUGI]. See also *infra* text prior to note 237. An earlier interpretation of Article 9 is that “[s]ince paragraph 1 . . . forbids aggressive war but not defensive war, defensive forces may be possessed” Shōichi et al., *supra* note 15, at 111.

19. See *infra* text accompanying notes 187–200.

means of resolving international disputes. Furthermore, the use of force to defend an ally when Japan has not been directly attacked is inconsistent with the principle of minimum necessary force.²⁰

The debates over individual and collective self-defense raise questions about the kind of role Japan may play in its security relationship with the United States. That relationship forms the backbone of Japan's security strategy²¹ and is embodied in the Mutual Security Treaty between the two countries.²² Throughout the Cold War, it was largely understood Japan was under the United States' security umbrella and would serve as a forward base for U.S. military operations in East Asia. The ending of the Cold War caused Japan to reevaluate that relationship, but the ties between Japan and the United States have strengthened, in part because of the threat to Japan posed by North Korea's development of nuclear weapons and missile technology²³ and the emergence of China as an economic and military power. In 1997, Japan and the United States issued a new set of guidelines under the treaty that contemplates Japan will give rearguard support for U.S. military activities, both in the region surrounding Japan and possibly further abroad.²⁴ This marked the

20. Takami Katsutoshi, *Kenpō Kyujō no "Kōtei Kaishaku" o Meguru "Hō" to "Seiji"* [The "Law" and "Politics" Surrounding the "Official Interpretation" of Article 9 of the Constitution], *JURISTO*, Jan. 1–15, 2004, at 131, 132. Takami argues this policy is the culmination of other government pronouncements on the use of force that date back to the 1950s. *Id.*

21. The Japan Defense Agency has taken the position that:

Japan . . . finds it realistic to establish an impeccable defense system to ensure its security by continuing alliance with the United States, which possesses immense military power, and which shares the basic value[s] and idea[s] called freedom and democracy, thereby effectively putting [the] war deterrent capability of the United States to work for ensuring the security of Japan, along with possessing an appropriate level of defense capability.

Japan Defense Agency, Significance of Japan-U.S. Security Arrangements at http://www.jda.go.jp/e/index_.htm. See also YUTAKA KAWASHIMA, JAPANESE FOREIGN POLICY AT THE CROSSROADS: CHALLENGES AND OPTIONS FOR THE TWENTY-FIRST CENTURY 53–54 (2003) (advocating a close security relationship with the United States); MICHAEL JONATHAN GREEN, JAPAN'S RELUCTANT REALISM: FOREIGN POLICY CHALLENGES IN AN ERA OF UNCERTAIN POWER 3 (2001) (same).

22. Treaty of Mutual Cooperation and Security, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1632 [hereinafter U.S.-Japan Security Treaty]. Article III allows for the presence of U.S. forces in Japan. See GEORGE R. PACKARD III, PROTEST IN TOKYO: THE SECURITY TREATY CRISIS OF 1960 (1966) (discussing the renewal of the security treaty).

23. In 1997, North Korea launched a three-stage Taepo-dong ballistic missile over Japanese airspace. GREEN, *supra* note 21, at 124.

24. Guidelines for U.S.-Japan Defense Cooperation, Sept. 23, 1997, available at <http://www.mofa.go.jp/region/n-america/us/security/guideline2.html> [hereinafter 1997 Guidelines]. For a discussion of the constitutionality of the new guidelines under Article 9, see KENPŌ TO HEIWA SHUGI, *supra* note 18, at 45–71; Chris Ajemian, Comment, *The 1997 U.S.-Japan Defense Guidelines Under the Japanese Constitution and Their Implications for U.S. Foreign Policy*, 7 PAC. RIM L. & POL'Y J. 323 (1998); Robert A. Fisher, Note, *The Erosion of*

first time that Japan's activities under the treaty were not limited to the Japanese homeland and its territorial waters. Developments since 9/11 have only further strengthened the relationship.²⁵ In the early 1990s, Japan was severely criticized for refusing to send troops during the 1991 Persian Gulf War even though it made substantial monetary contributions to the war effort. After 9/11, Japan quickly announced support for the United States. For instance, it dispatched naval forces to the Indian Ocean to provide logistic support for the invasion of Afghanistan.²⁶ Furthermore, over the past two years, Japan has deployed some 600 ground troops to participate in humanitarian and reconstruction activities in Iraq.²⁷ Japan also has agreed to cooperate with the United States in developing a ballistic missile defense system.²⁸

Japanese Pacifism: The Constitutionality of the 1997 U.S.-Japan Defense Guidelines, 32 CORNELL INT'L L.J. 393 (1999).

25. For a more detailed discussion of these developments, see Ralph A. Cossa & Brad Glosserman, U.S.-Japan Defense Cooperation: Has Japan Become the Great Britain of Asia? (2005), available at http://www.csis.org/pacfor/issues/v05n03_report.cfm.

26. Such assistance was authorized by the Anti-Terrorism Special Measures Law, passed by the Diet immediately after the terrorist attacks of September 11, 2001. Terotaisaku Tokubetsu Sochi Hō, Law No. 113 of 2001. For a discussion of the special measures law and an assessment of its constitutionality, see Edward J.L. Southgate, Comment, *From Japan To Afghanistan: The U.S.-Japan Joint Security Relationship, The War On Terror, And The Ignominious End Of The Pacifist State?* 151 U. PA. L. REV. 1599 (2003). For a discussion of Japan's response to terrorist attacks, see Liberal Democratic Party, National Defense Division, Policy Research Council, Establishing the Security Policy of Japan and the Japan-U.S. Alliance, Mar. 23, 2001, at 6-7.

27. Focus on a Changing Japan: Hearing Before the Subcomm. On Asia and the Pac. of the House Comm. on International Relations, 109th Cong. 9 (2005) (Statement of Thomas U. Berger). See Iraku ni Okeru Jindō Fukkō Shien Katsudō Oyobi Anzen Kakuho Shien Katsudō no Jisshi ni Kansuru Tokubetsu Sochi Hō [Special Measures Law Concerning Activities for Humanitarian Reconstruction Assistance in Iraq as well as Activities for Security Assurance], Law No. 137 of 2003; Iraku Nanmin Kyūen Kokusai Heiwa Kyōryokutai no Sochi nado ni Kansuru Seirei [Order Concerning Measures for the International Peace Cooperative Group for the Relief of Iraqi Refugees], Cabinet Order No. 123 of 2003. For a description of Japanese activities in Iraq, see Japan Defense Agency, *For the Future of Iraq*, available at <http://www.jda.go.jp/e/top/main.htm>.

28. MICHAEL SWAINE, RACHEL SWANGER, & TAKASHI KAWAKAMI, JAPAN AND BALLISTIC MISSILE DEFENSE (2001) (discussing cooperation between the United States and Japan in developing a ballistic missile defense system); Hideaki Kaneda, *Japan's Ballistic Missile Defense in Japan-U.S. Security Relations*, 3 ISSUES & INSIGHTS 33 (2003) (same). Terrorism and other perceived threats to national security have also led Japan to pass legislation that centralizes power in times of national emergency. In 2003, the Diet passed an Emergency Measures Law: Buryoku Kōgeki Jitai nado ni okeru Wagakuni no Heiwa to Dokuritsu narabi ni Kuni oyobi Kokumin no Anzen no Kakuho ni kansuru Hōritsu [Law Concerning the Maintenance of Our Country's Peace and Independence and the Safety of the Country and the Citizenry in the Event of Armed Attack and the Like], Law No. 79 of 2003. This legislation sets out procedures under which the Japanese government will respond to an armed attack from outside Japan, imminent armed attack, or an increase in tensions that may result in armed attack and the circumstances under which the SDF can be deployed in response. Amendments in 2004 allow for similar responses in situations that do not constitute an armed attack but nevertheless threaten public safety. Buryoku Kōgeki Jitai nado ni okeru Kokumin

The expanded reach of Japan under the Mutual Security Agreement Guidelines and Japan's deployment of forces to the Indian Ocean and to Iraq, even if limited to logistical support, reconstruction, and humanitarian assistance, raise issues under Article 9. Although Japan has strategic interests in the Middle East, it is not obvious Japan's activities in the region constitute self-defense—let alone adhere to the minimum force necessary for self-defense. It can be argued Japan is achieving indirectly, through a third country, what it cannot achieve directly under Article 9 by supporting nations that use armed force to resolve international disputes. The interpretive problems raised by Article 9 will become even more acute as the United States urges Japan to play a more active role in the security relationship. Sakamoto Kazuya, for example, asserts that any such expansion of Japan's role requires it to engage in collective self-defense, at least in Japanese territory, on the high seas, and in international airspace.²⁹ Furthermore, some in Japan press for stronger ties with other Asian countries, as those relationships are considered useful in and of themselves and can prevent Japan from relying too heavily on its relationship with the United States for its security.³⁰ If regional security arrangements are to be a viable option, Japan's credibility as a partner in those accords must rest on the legality of collective self-defense under the Constitution.³¹

3. UN Peacekeeping Operations and Participation in UN Institutions

Calls for Japanese participation in United Nations peacekeeping operations go back as far as 1960, when some Japanese leaders regretted that Japan did not assist in UN operations in the Congo.³² In 1992, the

no Hogo no tame no Sochi ni kansuru Hōritsu [Law Concerning Measures for the Protection of the Citizenry in the event of Armed Attack and the Like], Law No. 112 of 2004; Buryoku Kōgeki Jitai ni okeru Gaikoku Gunyōhin nado no Kaijōyusō no Kisei ni kansuru Hōritsu [Law Concerning the Regulation of the Marine Transport of Foreign Munitions and the like in the event of Armed Attack], Law No. 116 of 2004.

29. Sakamoto Kazuya, *The Japan-United States Security Treaty and the Right to Collective Self-Defense* 1 ISSUES & INSIGHTS 50 (2001). See also Liberal Democratic Party, National Defense Division, Policy Research Council *supra* note 26, at 8–10 (discussing the need for Japanese participation in collective self-defense and criticizing the Government's interpretation of Article 9).

30. See, e.g., Remarks Before the House of Councillors Research Commission, June 4, 2003 (Daii Akai), in SANGIIN KENPŌ CHŌSAKAI NI OKERU KŌJUTSUNIN NO KICHŌHATSUGEN [Basic Remarks of Persons Appearing at Public Hearings of the House of Councillors Constitutional Research Commission] 55, 56 (April 2005), available at <http://www.sangiin.go.jp/Japanese/kenpou/houkokusyo/pdf/koujutunin.pdf> (arguing that over the long term, Japan's security interests lie in strengthening relationships with states in Asia and that the U.S.-Japan Security Agreement might hinder those relationships).

31. House of Representatives CRC Final Report, *supra* note 1, at 309.

32. See JAPAN'S COMMISSION ON THE CONSTITUTION: THE FINAL REPORT 97 (John M. Maki trans. & ed., 1980) [hereinafter JAPAN'S COMMISSION ON THE CONSTITUTION].

Diet enacted legislation permitting Japan to join in UN peacekeeping operations.³³ Since then the SDF has participated in at least eight operations conducted by the United Nations.³⁴ Amendments to the Peacekeeping Operations Law in 2001 permit the SDF to monitor disarmament activities, to be stationed in and patrol buffer zones, and to collect and dispose of abandoned weapons. The amendments also expanded the set of situations in which the SDF may itself use weapons.³⁵

These developments marked a major shift in Japan's view of the SDF and the role that Japan should play in international affairs and laid the groundwork for expansions in its relationship with the United States.³⁶ Yet, the constitutionality of an SDF role in UN activities is debatable. On the one hand, nothing in the Constitution directly prohibits participation in international operations. Peacekeeping activities are circumscribed and by definition enjoy the support of the international community.³⁷ Peacekeeping forces are to use armed force only when they are under direct attack. On the other hand, for the SDF to place itself in situations where the use of force may be necessary seems inconsistent with the principle of minimum necessary force, particularly when Japan's security interests are low. Under another theory, since Article 9 represents the terms by which Japan was allowed to rejoin the community of nations, while it may be appropriate for the international

33. Kokusai Rengō Heiwa Iji Katsudō nado ni Taisuru Kyōroku ni Kansuru Hōritsu [Law Concerning Cooperation for United Nations Peacekeeping Operations and the Like], Law No. 79 of 1992.

34. These operations are the United Nations Peacekeeping Observer Force (in the Golan Heights), the United Nations Angola Verifications Mission II, the United Nations Observer Mission in El Salvador, the United Nations Transitional Authority in Cambodia, the United Nations Operation in Mozambique, the United Nations Operation in Somalia II, the United Nations Transitional Administration in East Timor, and the United Nations Mission of Support in East Timor. MINISTRY OF FOREIGN AFFAIRS OF JAPAN, DIPLOMATIC BLUEBOOK 138 (2003).

35. Kokusai Rengō Heiwa Iji Katsudō nado ni Taisuru Kyōroku ni Kansuru Suru Hōritsu no Ichibu o Kaisei Hōritsu [Law Amending a Portion of the Law Concerning Cooperation for United Nations Peacekeeping Operations and the Like], Law No. 157 of 2001. See also International Peace Cooperation Headquarters, Kokusai Heiwa Kyōryōku Hō no Ichibu Kaisei (Heisei 13 nen 12 gatsu) ni Tsuite [Concerning Revisions to a Portion of the International Peace Cooperation Law (Dec. 2001)], available at http://www.pko.go.jp/PKO_J/relatedbill/revision13.html (describing revisions).

36. See *supra* text accompanying notes 20–31.

37. For example, Onuma Yasuaki argues under international law, when a country uses force to resolve an international dispute, it is acting in its own self-interest. In contrast, actions sanctioned by the United Nations are a police function and take on a public character, even if such activities involve the use of force. It follows in his view that Article 9 does not prohibit the SDF's participation in United Nations peacekeeping operations or its cooperation with a military force operating under UN authority. Remarks before the House of Councillors Constitutional Research Commission, Mar. 3, 2004 (Onuma Yasuaki) in House of Councillors CRC Remarks of Experts, *supra* note 5, at 365, 368.

community to use force in connection with peacekeeping operations, it is not appropriate for Japan to do so.

Article 9 may stand as an impediment to Japan's ability to play a greater role in the United Nations. For years, Japan has wanted a permanent seat on the Security Council, believing its economic power and participation in world affairs merits such a recognition.³⁸ Some argue Article 9 prevents Japan from becoming a permanent member of the Security Council because its ambiguous language makes it unclear whether Japan would be able to meet its responsibilities as a permanent member. For instance, Foreign Minister Nobutaka Machimura has asserted: "The Constitution should be amended to clearly position Japan's international peace-building activities The Constitution should be reformed because it is better to ensure that no confusion will arise when Japan fulfills its duties as a permanent member"³⁹

III. CONSTITUTIONS AND CONSENSUS

There appears to be a consensus among segments of Japanese society that a confluence of trends—Japan's emergence as an economic power, its greater participation in Pacific and world affairs, its aspiration to a more important role in the United Nations, the severe criticism it received when it did not participate directly in the Persian Gulf War, pressures from the United States to expand its security relationship by putting SDF personnel in harm's way, developments on the Korean peninsula, the emergence of China as an economic and military force, and 9/11—could well require Japan to take steps that, if it wishes to remain true to a constitutional form of government, might involve far more than just a reinterpretation of Article 9.⁴⁰ Do the debates about these issues

38. "Japan's role has . . . become increasingly vital to the maintenance of international peace and security, which is precisely the mandate of the Security Council. We believe that the role that Japan has played provides a solid basis for its assumption of permanent membership on the Security Council." Junichiro Koizumi, Prime Minister of Japan, Speech before the United Nations General Assembly: A New United Nations for the New Era (Sept. 27, 2004), available at http://www.kantei.go.jp/foreign/koizumispeech/2004/09/21address_e.html. Japan is the second largest contributor to the United Nations after the United States. In 2002, it was assessed \$218.4 million, 19.669 percent, of the UN regular budget. The United States was assessed \$283.1 million, 22 percent. Germany, the third largest contributor, was assessed \$109.3 million, 9.845 percent. United Nations, *Chapter 5: Is the United Nations Good Value for the Money?*, in *QUESTIONS & ANSWERS . . . IMAGE & REALITY . . . ABOUT THE UN* (2003), available at <http://www.un.org/geninfo/ir/>.

39. Machimura: *Revise Top Law for P-5 bid*, DAILY YOMIURI, Sept. 30, 2004, at 3.

40. For a discussion of the developments in the 1990s that led to the formation of the constitutional research commissions, see KENPŌ "KAISEI" NO SŌTEN, *supra* note 17, at 21-43. Watanabe speculates the Liberal Democratic Party's 1993 defeat after 38 years in power and the Hosokawa administration's focus on political reform led naturally to talk of

provide insight into larger questions, such as the role of a constitution, not only in Japan, but in other modern societies as well? How does a society like Japan reach agreement on contentious security and identity issues, and what role does a constitution play in this decision-making process?

Kim Scheppele describes a group of comparative constitutional scholars who question the possibility of deriving broad models of constitutionalism that will apply over a wide range of constitutional systems. She writes:

The urgent issue in constitutional studies typically is to know whether the experiences of some constitutional settings are helpful for understanding others—and that will depend on how similar other systems are to one's own, whether they have dealt with the same sort of historical problems, whether they have drawn their constitutional ideas from the same well.⁴¹

These difficulties in deductive methodology have led recent scholars to advocate what Scheppele describes as a more inductive, contextual approach to constitutions, a kind of constitutional “ethnography.” Such ethnography, she writes, “does not ask about the big correlations between the specifics of constitutional design and the effectiveness of specific institutions but instead looks to the logics of particular contexts as a way of illuminating complex interrelationships among political, legal, historical, social, economic, and cultural elements.”⁴² The purpose of examining such contexts is to identify “the *mechanisms* through which governance is accomplished and the *strategies* through which governance is attempted, experienced, resisted and revised, taken in historical depth and cultural context.”⁴³

constitutional change. Watanabe Osamu, *Kyūjū Nendai Kaikenron no Nerai to sono Tokuchō* [The Aims and Characteristics of the 90's Debate on Constitutional Change], in “KENPŌ KAISEI” HIHAN [“Constitutional Revision”: a Critical Look] 18, 18–20 (Watanabe Osamu et al. eds., 1994).

41. Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 LAW & SOC'Y REV. 389, 390 (2004).

42. *Id.* For work representative of this kind of approach, see e.g., Dae Kyu Yoon, *The Constitution of North Korea: Its Changes and Implications*, 27 FORDHAM INT'L L.J. 1289 (2004) (discussing the meaning of a constitution in a totalitarian system); GRAHAM HASSALL & CHERYL SAUNDERS, *ASIA-PACIFIC CONSTITUTIONAL SYSTEMS* (2002).

This contextual approach to comparative constitutionalism contrasts with a more formal, deductive approach towards constitutional studies. A good discussion of these approaches is found in Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570 (2004) (book review). As will be seen in the foregoing discussion, this Article attempts to draw elements from both approaches in examining the Japanese amendment debates.

43. Scheppele, *supra* note 41, at 391.

Once scholars identify a society's repertoire of relationships, mechanisms, and strategies, they can move to a more modest form of theorizing by comparing the repertoire with those found in other systems. "In the end, what one has is not a universal one-size-fits-all theory . . . but instead a set of *repertoires* that can be found in real cases and that provide insight into how constitutional regimes operate."⁴⁴ For Scheppele, the identification of such repertoires then enables us to both "see more deeply into particular cases" and have "a sense of what to expect in the future," although not in the sense of being able to predict outcomes with certainty.⁴⁵ "Constitutional ethnography has as its goal, then, not prediction but comprehension, not explained variation but *thematization*."⁴⁶

Some constitutional scholarship has focused on how constitutions provide heuristic devices, basic strategies that enable people to understand and respond to their environment,⁴⁷ that help a society reach agreement and avoid making ill-considered decisions. In other words, these heuristic devices represent a subset of Scheppele's mechanisms and repertoires for governance. John Elster, building on the work of Thomas Schelling, demonstrates one function of constitutions by examining human strategies to address the problems of passion, interest, and time-inconsistency in decisionmaking.⁴⁸ In his famous example, sailors know in advance the Sirens are deadly, but cannot resist their song once it is heard. Ulysses wants to hear the song, so he orders his men to tie him to the mast and ignore his commands to release him until the

44. *Id.*

45. *Id.*

46. *Id.*

47. People use an "adaptive toolbox" to "provide strategies—cognitive, emotional, and social—that help to handle a multitude of goals by making decisions quickly, frugally, accurately, or, if possible, not at all." Gerd Gigerenzer, *The Adaptive Toolbox*, in *BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX* 37, 43 (Gerd Gigerenzer & Reinhard Selten eds., 2001) (citations omitted).

48. ELSTER, *supra* note 2, at 7–34 (citing THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* (1960)). "Hyperbolic discounting" refers to an observed tendency in people to apply high discount rates in choosing near-term payoffs and lower discount rates for payoffs in the distant future. A person who has the choice of receiving \$75 today or \$100 next week will choose \$75, but when offered the choice of receiving \$75 a year from now or \$100 a year and week from now will choose \$100. Time-inconsistency arises because as the year goes on the person will prefer the \$75 payment. Hyperbolic discounting tends not to be observed in more sophisticated settings such as stock markets. "Strategic time-inconsistency" refers to empty threats, or situations in which an agent's statement (that he will act in some way or that some result will occur if another agent acts in some way) lacks credibility. The second agent will go ahead despite that statement because he knows the first agent will not act as stated because it is not in his interest to do so. *Id.* 34–45. A parent at a supermarket who warns his child that he will leave him behind if he does not hurry up is making an empty threat.

danger is past—he precommits himself to this strategy before he and his crew draw within range of the Sirens.⁴⁹

Similarly, “Constitutionalism ensures that constitutional change will be slow, compared to the fast lane of ordinary parliamentary politics.”⁵⁰ Specific provisions, such as amendment requirements⁵¹ and rules for suspending the constitution, make constitutions resistant to change.⁵² Other features related to the machinery of political decisionmaking, such as the separation of powers, a bicameral legislature, and the executive veto, can also have precommitment effects by abating the forces of interest, passion and time-inconsistency. Requiring the agreement of more than one branch of government demands more time and makes it possible that the ill-considered decision of one branch will be counterbalanced by better-thought-out decisions by the others.⁵³

Cass Sunstein contributes to this approach by arguing that a constitution does more than prevent a society from making poor decisions. A constitution helps society make hard decisions in the first place by making precommitments about the way such decisions will be made. His task is normative, an attempt to distinguish good constitutions from bad ones in service of his ideal of deliberative democracy.⁵⁴ “A deliberative democracy, operating under a good constitution, responds to political disagreements not simply by majority rule but also by attempting to create institutions that will ensure reflection and reason-giving.”⁵⁵ Sunstein believes such deliberation can help resolve disputes by clarifying facts, by delegating decisions to trusted persons, or by demonstrating certain positions cannot be sustained.⁵⁶

Sunstein is also concerned, however, that deliberation can heighten political tensions, sometimes to the breaking point, as like-minded per-

49. JON ELSTER, *ULYSSEES AND THE SIRENS* 36–37 (rev. ed. 1984)

50. *Id.* at 100.

51. *Id.* at 101–04.

52. *Id.* at 104–05.

53. Elster is also known for identifying both “upstream” and “downstream” authorities in the constitution-making process. The framers of constitutional precommitments are usually themselves constrained by upstream authorities, who convene constitutional assemblies and select delegates to constitutional conventions. *Id.* at 105–06. Elster specifically cites the Japanese Constitution as an example in which upstream authorities (the occupation forces) imposed its constitution on the Japanese legislature that debated and approved the amendments. *Id.* at 107. In other cases, such upstream authorities have greater or lesser degrees of success in binding delegates to a constitutional convention. *Id.* at 108. At the other end of the process are downstream authorities: the constituents who at some point will ratify the finished product. Elster argues sometimes delegates to constitutional assemblies will be constrained by a ratification requirement to draft constitutions (or by extension, amendments to constitutions) that are likely to be accepted by their constituencies. *Id.* at 113–15.

54. SUNSTEIN, *supra* note 2, at 97 & 251–52 n.4.

55. *Id.* at 239.

56. *Id.*

sons tend to group together and form extreme views.⁵⁷ The potentially destructive intra-group radicalization of churches, political parties, trade groups, unions, and interest groups results in part from social influences on behavior. An individual will often take a position because it agrees with that of others in the same group even though there is no guarantee that the group is right. This is partly because it is often costly to acquire information to form one's own judgment and partly because an individual will often choose a position to preserve her reputation with other group members.⁵⁸ The effect of these two forces can be amplified by an information cascade, the rapid spread of ideas or behaviors once a critical mass of adherents has been reached.⁵⁹

These social influences combine with another feature of groups that contributes to social polarization. A group with a finite number of members has a finite pool of arguments its members can use to justify a group's position. Drawing from the results of psychological group experiments, Sunstein argues that a group with a limited pool of arguments has a tendency to adopt the most persuasive argument available. This often leads a group to take the most extreme version of the position under consideration.

An effective constitution can dampen the polarizing effects of these dynamics in two ways. First, it can increase "the likelihood that government power will be unavailable to those who have not spoken with those having competing views."⁶⁰ Therefore, deliberative groups are not necessarily permanently entrenched. In some cases, a deliberative group polarized on a particular position will depolarize when put into contact with another group:

A democratic constitution . . . increases the likelihood that members of the relevant groups are not isolated from conversation with people having quite different views. The goal of that conversation is to promote the interests of those inside and

57. *Id.* at 15–42, 239–40.

58. For example, a church member may privately have doubts about intelligent design but will still criticize evolutionary theory because she wants to be viewed by her fellow church members as faithful.

59. An information cascade occurs when an individual, faced with the choice between A and B, chooses A because everyone else is doing so (as it were, a public signal of what to do), even though the individual's private signal tells him to choose B. Thus it is possible for mistaken judgments to spread rapidly through a population. But, under this theory, such cascades are so volatile they are easy to reverse through the infusion of additional information. For a discussion of the phenomenon, see Abhijit V. Banerjee, *A Simple Model of Herd Behavior*, 107 Q. J. ECON. 797 (1992); Sushil Bikhchandani, David Hirshleifer & Ivo Welch, *A Theory of Fads, Fashion, Custom and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992 (1992).

60. SUNSTEIN, *supra* note 2, at 240.

outside the relevant enclaves, by subjecting group members to competing positions, by allowing them to exchange views with others and to see things from their point of view, and by ensuring that the wider society does not marginalize, and thus insulate itself from, views that may turn out to be right or at least informative.”⁶¹

Second, constitutional decisionmaking involves not just a set of procedures, but also concepts ranging from the very abstract, such as equality, happiness, or security, to the very concrete, such as allowing a copy of the Ten Commandments to stand on the capitol grounds. Such concepts and their different levels of abstraction allow deliberative groups to reach what Sunstein terms “incompletely theorized agreements.” These are theoretical compromises that allow persons with different points of view to reach agreement on one level of abstraction while not reaching agreement on other levels.⁶² The deliberative groups making up a society may never agree on the issue of gay marriage, for example, but there can be widespread consensus on the idea of equality. Or, people can agree on the assessment of a particular tax but have different and perhaps irreconcilable reasons for their support.⁶³

61. *Id.* at 41. Such contact between deliberative groups does not guarantee depolarization and with it, the likelihood of consensus, but may in fact lead to it. Contact with another group may serve as an external shock that disturbs the equilibrium reached within a group. *Id.* at 30–31. Such contact also increases the pool of arguments for or against a particular policy. *Id.* at 44.

62. *Id.* at 50.

63. One can have an incompletely theorized agreement on a general principle without agreement on what the principle entails, or one can have incompletely theorized agreements about particular outcomes, with agreement on low-level reasons that account for them. *Id.* at 56–57. In between, people can agree on a mid-level reason for action, but disagree about both supporting higher level reasons and particular outcomes. *Id.* For this latter point, Sunstein uses the example that people might agree government should not discriminate on the basis of race, yet have conflicting views on a more general concept of equality and on whether a non-discrimination principle supports affirmative action. *Id.* Sunstein is aware that Elster has recently expressed doubt whether the framers of a constitution would choose to limit themselves in this way. *Id.* at 251–52 n.4. Sunstein avoids this problem by arguing that his analysis is normative, not descriptive of how a constitution might emerge. *Id.* Elster's primary concerns relate to the extent to which collective decisionmaking is like individual decisionmaking. ELSTER, *supra* note 2, at 92. He acknowledges that constitutions often bind others and are not acts of self-binding. *Id.* at 92–94. Furthermore, he observes that constitutions are not binding in the strict sense, in so far as constitutions do not make it impossible for a society to engage in a particular behavior; they only make it difficult to do so. *Id.* at 94–96. Elster concludes, however, that constitutional precommitment is not meaningless because constitutions can be self-binding, particularly when the framers of a constitution make up the first legislature. *Id.* at 94. He also notes that future generations might have the same reasons for self-binding as do the original framers. *Id.* Finally, he points out that not all individual precommitment strategies make future behaviors impossible. *Id.* Elster's point (that future generations might have the same reasons for self-binding as do the framers) reflects a more general idea discussed by Elster and reflects the fact that constitutions, as well as their inter-

The procedural and conceptual heuristics provided in constitutions to enable consensus are a subset of all human cultural tools, and as such they share both the capacities and limitations common to these tools. J.M. Balkin argues human understanding and human institutions are made possible through conceptual tools he refers to as “cultural software.” Such tools are “the abilities, associations, heuristics, metaphors, narratives, and capacities that we employ in understanding and evaluating the social world.”⁶⁴ In Balkin’s view, a deeper understanding of how these conceptual tools operate, are transmitted, and evolve helps explain how “cultural understandings can be shared while still accounting for the considerable differentiation and disagreement in belief among members of the same culture or interpretive community.”⁶⁵

One of the most important themes that emerge from Balkin’s work is that all cultural tools, be they tools of understanding, technology, or social institutions, are subject to “bricolage,” a term Balkin borrows from Claude Levi-Strauss.⁶⁶ Cultural tools are subject to bricolage in that they are themselves the cumulative result of earlier tools. “The history of thought is the history of the cumulative marshaling of existing capacities to form new ones, the use of older cultural software to create new ‘idea-programs.’”⁶⁷ Balkin argues this has four implications: “Cultural bricolage (1) is cumulative, (2) involves unintended uses, (3) is economical or recursive, and (4) has unintended consequences.”⁶⁸ The cumulative nature of cultural tools implies “[t]he tools . . . one can create at a particular time depend largely on the available materials that lie to hand.” Further, “[t]he complexity and performance of a tool are necessarily limited by the nature of the tools available to construct it.”⁶⁹ For example, a space program is made possible, and at the same time limited, by the technologies and institutions that preexist it. Similarly,

pretation and implementation, are product of bricolage, a concept I discuss in the next section. Elster distinguishes between essential constraints, that are created or chosen precisely because of their precommitment functions, and incidental constraints, those that may not have been chosen by an individual for their constraining effects, but that nevertheless have such effects. *Id.* at 4. Thus, in one sense, it does not matter whether the framers of a constitution choose to bind themselves on purpose; what matters is whether any features of a constitution have constraining effects and whether those effects provide some benefit to the society in question.

64. BALKIN, *supra* note 3, at 6.

65. *Id.* at 7.

66. As Balkin discusses, Levi-Strauss argued that “human thought operates like the bricoleur, or odd-job person, who fixes a leak or other problem with whatever tools lie to hand.” *Id.* at 31 (citing CLAUDE LEVI-STRAUSS, *THE SAVAGE MIND* 16–36 (1966)).

67. *Id.* Mark Tushnet also uses the concept of bricolage in comparative constitutional studies in Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225, 1285–1301 (1999).

68. BALKIN, *supra* note 3, at 32.

69. *Id.*

financial institutions, such as a mutual fund, are made possible by a number of interrelated institutions and practices.⁷⁰

Cultural bricolage also means tools can be put to uses for which they were not originally intended. Institutions reflect the multifunctional nature of these tools.⁷¹ Balkin writes, "[H]uman institutions solve problems of organization, reproduction, and stabilization by adopting and adapting features of other social structures that their members are familiar with. In this way new forms of human sociability are constructed out of older ones."⁷² Kinship is a good example of this kind of institutional tool; it is an obvious means by which a society organizes itself, and extensions of the concept have been used by many cultures to encourage cooperation beyond blood relatives.⁷³

By "economical and recursive," Balkin means a relatively small set of tools can be used in a large number of ways, thereby creating new conceptual or institutional tools that in turn are applied to older tools. Balkin uses gender to illustrate this point: gender is not only used to distinguish between male and female, but also to stereotype, and in reference to a variety of objects like ships and hurricanes. In addition, gender can be used simply for conceptual purposes. For instance, many languages divide nouns into gender categories that have nothing to do with biological gender. The use of gender in these other ways, however, can affect the way male and female are understood.⁷⁴ This point can be applied to deliberation as well. Constitutionally enhanced deliberation can be used to avoid ill-considered decisions, as understood by Elster, but it can also be used to achieve consensus, as envisioned by Sunstein. Deliberation might involve trying to use the deliberative process itself to achieve consensus through the sharing of ideas and arguments, or it might be used to help deliberative groups realize a consensus had already emerged before deliberation began. The extent to which such deliberation helps a society achieve or recognize agreement will in turn impact how a society values its constitution.

Finally, according to Balkin, "[t]he bricoleur's economical and cumulative use of tools in unintended ways can and often does lead to unexpected and unintended consequences both for good and for ill."⁷⁵

70. *Id.*

71. *Id.* at 32-33.

72. *Id.* at 33.

73. To illustrate from the Japanese experience, fictive kinships were used by lords in feudal Japan to strengthen relationships with their vassals. JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER* 37-38 (1991); John Whitney Hall, *Feudalism in Japan—A Reassessment*, in *STUDIES IN THE INSTITUTIONAL HISTORY OF EARLY MODERN JAPAN* 15, 50 (John W. Hall & Marius B. Jansen eds., 1968) (discussing kinship terms).

74. BALKIN, *supra* note 3, at 34.

75. *Id.*

Tools are transmitted and evolve over time; this is a fact that dovetails with Sunstein's discussion of how positions are taken and transmitted within groups.⁷⁶ As with any product of an evolutionary process, a social tool results from historical developments that foreclose certain avenues of development and open up other possibilities. As a result, social tools possess two crucial attributes. First, the path-dependent nature of such tools reiterates the need, as Scheppele advocates, to look closely at how the social mechanisms and concepts used for governance work within a particular context. Second, as Balkin puts it,

[c]ultural tools produced by bricolage never work perfectly: when they do work it is usually only well enough for the purpose at hand There is never a time when the products of cultural bricolage lack a certain jerry-built character, when they do not have unexpected side effects or the potential for such side effects. The history of the development of culture is always the history of muddling through⁷⁷

76. Balkin relies on the memetic transmission of cultural information, introduced by Richard Dawkins and developed by scholars such as Susan Blackmore and Robert Aunger. See RICHARD DAWKINS, *THE SELFISH GENE* (1989 ed.); SUSAN BLACKMORE, *THE MEME MACHINE* (1999); DARWINIZING CULTURE (Robert Aunger ed., 2000); ROBERT AUNGER, *THE ELECTRIC MEME* (2002). Memes, to use Balkin's language, are pieces of cultural software, or as Dawkins describes them, replicators, that are the basic units of cultural information. DAWKINS, *supra*, at 192. These pieces of cultural software are subject to high levels of variability and become units of selection, and the "environment" in which such memes "compete" is the human mind and the various media, such as books and sound recordings, that preserve memes outside of the body. Robert Boyd and Peter J. Richerson focus instead on cultural mechanisms that transfer and transform the cultural information that affects behavior. ROBERT BOYD & PETER J. RICHERSON, *CULTURE & THE EVOLUTIONARY PROCESS* (1985). They identify three such mechanisms, direct bias, frequency dependent bias, and indirect bias. These can be roughly understood as rules of thumb for "choosing" among possible cultural traits in a given social environment. *Id.* at 134–35. With direct bias, the physical environment itself determines what trait will be selected by rendering one cultural variant "more attractive than others. *Id.* at 135. For example, if people live in an area where there is ready access to wood, but little access to stone, this will impact what kinds of houses they will build. With direct bias, there will tend to be little variation when cultural norms are transmitted. With frequency dependent bias, a person chooses a behavior in which the most people, or conversely, in which the least people engage. *Id.* at 135, 204–40. With indirect bias, people choose a behavior based on some other trait that people who already have engaged in that behavior possess—a person wears a particular athletic shoe because a successful athlete does too. *Id.* at 135.

77. BALKIN, *supra* note 3, at 39. The idea that evolving cultural tools work only well enough for the purpose at hand is made by Jody Kraus in her discussion of the transmission of business norms. Jody S. Kraus, *Legal Design and the Evolution of Cultural Norms*, 26 J. LEGAL STUD. 377 (1997). Gigerenzer also writes, "The notion of an adaptive toolbox full of specialized devices invokes the more modest abilities of a 'backwoods mechanic and used part dealer[.]'" Gigerenzer, *supra* note 47, at 43.

One would then expect that the precommitment strategies and concepts provided in constitutions, as well as the decisions emerging from them, will present unexpected results.

IV. DELIBERATION AND BRICOLAGE IN THE PROCESS AND SUBSTANCE OF THE AMENDMENT DEBATES

The scholarship on constitutions as providing heuristics for consent fits well with Japanese understandings of law. John Haley has shown how allocations of power in Japan, dating as far back as the first consolidations of villages and continuing through feudal and modern times, are marked by the separation of the authority to promulgate rules and norms from the power to enforce them. Law in traditional Japan was restricted to administrative and adjudicative practices that applied to the ruling class and its vassals. Other, less formal modes of social control were used in the Japanese villages, where the large majority of the population lived. Unlike in the West and China, in Japan, no uniform moral theory served as an ultimate legitimizing force for power. As a result, "[l]egitimacy in Japan derives above all else from consent and consensus, as reflected in history as a shared, present perception of the past and custom."⁷⁸ Haley explains that "formal law making law-enforcing processes—whether legislative, bureaucratic, or judicial—functions in large measure as consensus-building processes . . ."⁷⁹ Substantive legal norms, as the product of such consensus, enjoy legitimacy and "thus operate as principles—*tatema*—that both shape and reflect consensus. Without effective formal enforcement, they can only partially bind or command. They do not fully control or determine conduct but they do influence and restrain."⁸⁰

The emphasis on consensus is an outgrowth of Japan's highly communitarian society, based on a complex web of reciprocal relationships. This is not a community, however, in which everyone is equal or where everyone is included. Haley writes:

Even within the community not all necessarily participate. To have a voice, one must sit at the table. Conflicts over political

78. HALEY, *supra* note 73, at 195.

79. *Id.* at 198.

80. *Id.* at 199. Peter Katzenstein takes this view of Article 9. KATZENSTEIN, *supra* note 12, at 47. He also cites with approval the work of Tom Rohlen, who also observes "Japan is marked by a coincidence of strict, vertical systems and high degrees of lower-level autonomy." *Id.* at 32 (citations omitted). For a more detailed discussion of the Japanese legislative process, see Mutsuo Nakamura & Teruki Tsunemoto, *The Legislative Process: Outline and Actors*, in FIVE DECADES OF CONSTITUTIONALISM, *supra* note 4, at 195.

influence in Japan are less about who has the authority to make a decision or who wins the majority to their side than simply having a seat. And as within all hierarchical social structures, the opinions and preferences of some matter more than those of others. Equality of legal status does not mean equality of influence. But that too can to some degree be a matter of consensus.⁸¹

The debates on Article 9 provide a good opportunity to observe how law functions in the Japanese context. Segments of Japanese society are now trying to determine whether there is “a shared, present perception” of important aspects of its identity: its past militarism, its experiment with democracy, and in particular, its present security needs, its experience with Article 9, and how much of the past Japan can take into the future.

A. Deliberative Groups

Various groups have taken different stances towards Article 9, and attempts to amend it began soon after the first moves to rearm in the 1950s. Thomas Berger identifies three major political subcultures in Japan during the postwar period: right-idealist, centrist, and left-idealist.⁸² Right-idealists had a strong reverence for Japanese tradition and values. Although they appreciated the enormity of the Japanese defeat, they opposed occupation reforms they believed were meant to weaken Japan, including Article 9. As international realists, however, they supported a strong alliance with the United States. They also believed in a strong military and advocated the repeal of Article 9, as well as the removal of other restraints on the military. At the same time, they supported civilian control over the armed forces.⁸³

Centrists were equally critical of the Japanese pre-war establishment and found their models for a new Japan in capitalism and the United States. There were three main pillars to their defense policy. The first was the perception that Japan was incapable of defending itself alone, a view, as I discussed earlier, that is still widely shared.⁸⁴ Second was the belief that Japan should focus first on economic development. Third, centrists feared the reemergence of the military and the threat it might pose to democracy.⁸⁵ The outcome was almost total dependence on the United States for security, resulting in deference to the United States in security matters and in East Asian diplomacy, permission for the United

81. JOHN OWEN HALEY, *THE SPIRIT OF JAPANESE LAW* 17 (1998).

82. THOMAS U. BERGER, *CULTURES OF ANTIMILITARISM: NATIONAL SECURITY IN GERMANY AND JAPAN* 56 (1998).

83. *Id.* at 56–57.

84. See *supra* text accompanying note 21.

85. BERGER, *supra* note 82, at 63.

States to maintain bases in Japan, and Japan's maintenance of a force of its own.⁸⁶ The Liberal Democratic Party (LDP), formed in 1955, was a coalition of centrists and right-idealists. Most business leaders shared centrist views and supported ties with the West, although opinion was split over rearmament, with strong proponents and detractors.⁸⁷

Left-idealists wanted a complete break with Japan's past, which they saw as responsible for Japan's destruction. This group had a strong pan-Asian identity. Although they were not Stalinists, they viewed the Soviet Union and China as friendly and were strongly opposed to Japan's security relationship with the United States. Their pacifist ideals, which they believed were both embodied and implemented in the Constitution, were drawn from General Douglas MacArthur and then-Prime Minister Shidehara Kijuro.⁸⁸ Left-idealists were supported by the mainstream of the intelligentsia and by the public service segment of the organized labor movement.⁸⁹ On the political level, left-idealists found representation for their views in the Japanese Socialist Party (JSP) and the more radical Japanese Communist Party (JCP).

As Berger notes, these subcultures, the groups that represented them, and the rough accommodations they reached in the 1950s and early 1960s set the pattern for Japan's approach to security that became more firmly embedded in the ensuing decades. There has, however, been a slow shift to the center. Throughout the 1960s and the first half of the 1970s, support for a minimal self-defense force rose, but a strong preference for non-military means for defense continued.⁹⁰ Centrist scholars and media began to obtain a broader hearing.⁹¹ During the 1980s, growing economic power and increasing trade tensions with the United States caused the right-idealists, who had previously strongly supported the United States, to emphasize economic over military power.⁹² From the 1960s to the 1980s, left-idealists continued to oppose militarism. The Japan Socialist Party saw some gains in the 1960s and 1970s and continued to oppose militarism and the U.S. alliance. Berger argues, however, that "[i]ncreasingly the public began to view the JSP as mired in anachronistic thinking . . .".⁹³ The JSP eventually moderated its defense policy when it joined the coalition that wrested power from the LDP in 1993. It made further changes when it joined with the LDP during the mid 1990s.⁹⁴ Also, in 1991, the

86. *Id.*

87. *Id.* at 76.

88. *Id.* at 59–60.

89. *Id.* at 73, 75–76.

90. *Id.* at 112–14.

91. *Id.* at 116–17.

92. *Id.* at 146–47.

93. *Id.* at 120–22, 163.

94. *Id.* at 184–85.

party changed its name to the Social Democratic Party of Japan (SDPJ).⁹⁵ Berger writes that immediately after the JSP came to power in the 1990s, it appeared as if it would completely moderate its left-idealist stance. However, this appearance was short-lived, as members of the SDPJ soon objected strongly to the recommendation by leaders at the Japan Defense Agency to amend Article 9.⁹⁶

The result is that despite movement to the center, the current debates continue to reflect the three political cultures and their views on defense. At the same time, the relative waning in influence of the left-idealist viewpoint, at least among the political parties, shows the close relationship between policy positions and the groups that bear them. Sunstein and Balkin's work indicates that while ideas may persist because of their merits, they also endure because of who bears them and how successful these groups are in sustaining themselves over time.⁹⁷ The JSP won a majority for the first and only time in 1947 and took part in coalition governments in the Katayama and Ashida cabinets, although it was not able to widen its base of support while in office.⁹⁸ Internal disputes, opposition from the United States, competition from the Japanese Communist Party and left-leaning splinter groups, the consolidation of power in the LDP from 1955–1993, and the gradual discrediting of the JSP's economic policies, especially as Japan's economy mushroomed, all combined to prevent the JSP from becoming a dominant force in Japanese politics.⁹⁹ Richard Mason and John Caiger argue that the Socialists have aligned more with the LDP on foreign policy issues, largely because of the durability of the U.S.-Japan alliance, trade problems with the United States, growing economic power, and world conditions.¹⁰⁰ The passage of time may have revealed the positions initially taken by the JSP as untenable on their merits, but the relationship between

95. RICHARD SIMS: *JAPANESE POLITICAL HISTORY SINCE THE MEIJI RENOVATION: 1868–2000*, at 335. (2001). In 1996, a significant number of more conservative members of the SDPJ left to join the newly forming Minshuto, or Democratic Party. *Id.* at 349.

96. BERGER, *supra* note 82, at 185.

97. Balkin makes this point in connection with scientific information. In his view, scientific truths can be compelling, but often the audience must be trained to perceive the value of such truths. "[E]ven the most indubitable of truths may require elaborate institutions of education . . . if they are to be preserved and propagated." BALKIN, *supra* note 3, at 86. Without such institutions, "the true beliefs that they propagate may become extinct as well." *Id.*

98. See SIMS, *supra* note 95, at 255–58.

99. See *id.* at 261, 264, 283–84, 308, 313, 335–37, 348–49 (discussing developments in the history of the JSP). According to Sims, the JSP's decision to lead a coalition government required it to make compromises that alienated its supporters and exacerbated internal divisions. *Id.* at 257. Moreover, the JSP's rise to power coincided with a shift in U.S. Occupation policy from social reform (several aspects of which were championed by the JSP) to economic development. *Id.* at 258.

100. R.H.P. MASON & J.G. CAIGER, *A HISTORY OF JAPAN* 369 (rev. ed. 1997).

deliberative groups and the positions they take is a complex one in which each affects the other.

Because of the important role they play in the amendment process, I pay particular attention to the political subcultures as they are manifested in the political parties.¹⁰¹ (However, it is important to note that national security issues and Article 9 are being debated by the government bureaucracy, media, academics, business associations, and other interest groups, many of which can trace their origins to the immediate postwar period, if not even earlier.¹⁰²) Japan's parties are famous for their factionalism. Berger writes, "Factional struggles in Japan are fierce, merciless, and relentless."¹⁰³ By

101. For a recent discussion of Japanese postwar politics, see SIMS, *supra* note 95.

102. For a discussion of the groups influential in the formation of Japanese foreign policy, see GREEN, *supra* note 21, at 47–69. A thorough examination of the process of societal consensus building would examine the role that other deliberative groups, including non-governmental organizations, play in the larger Japanese society; however, it is not within the scope of this paper to do so. For recent discussions of such groups in Japan, see the collection of essays in *THE STATE OF CIVIL SOCIETY IN JAPAN* (Frank J. Schwartz & Susan J. Pharr eds., 2003). As Veronica Taylor observes, the views of policy makers and other aspects of the revision debates are broadly accessible to such groups, as well as the Japanese public. Developments in the debates are widely reported in the press, a voluminous amount of material produced by the constitutional research commissions is available on the Internet as part of recent government policy promoting transparency in decisionmaking, and several groups on different sides of the debates have disseminated their views online. Interview with Veronica Taylor, Director, Asian Law Center, University of Washington, in Seattle, Wash. (Aug. 10, 2005). The net effect is that it is possible for interested groups and members of the public to familiarize themselves with the various sides of the debate and the positions of others. In this sense, it is possible, in my view, to speak of a national conversation on constitutional revision. This conclusion, however, is tentative. Laurie Freeman argues although the Internet creates the potential in Japan for greater involvement by non-governmental organizations in policy-making, these developments are recent and are preceded by what Freeman views is the relative homogenization of the Japanese media. Laurie Freeman, *Mobilizing and Demobilizing the Japanese Public Sphere: Mass Media and the Internet in Japan*, in *THE STATE OF CIVIL SOCIETY IN JAPAN* 235 (2003).

103. BERGER, *supra* note 82, at 81. For further discussion of factions in Japanese politics, see TAKETSUGU TSURUTANI, *POLITICAL CHANGE IN JAPAN* (1977). Tsurutani attributes factionalism within the LDP to traditional reciprocal relationships between older superiors (*oyabun*) and younger subordinates (*kobun*) that exist throughout Japanese society, and the fact the LDP originated in the 1950s from an amalgamation of several different parties, each with their own sets of relationships and loyalties. *Id.* at 97–105. Attempts were made in the 1990s to reform factionalism within the LDP, but factions continue out of recognition of their usefulness in selecting the party president and the role they play in bringing some cohesion within such a large party. See Liberal Democratic Party of Japan, *The Organization of the LDP: LDP Policy Groups (Factions)*, at <http://www.jimin.jp/jimin/english/overview/10.html>. (last visited Sept. 29, 2005) (recognizing eight 'policy groups' or factions) See also J. MARK RAMSEYER & FRANCES MCCALL ROSENBLUTH, *JAPAN'S POLITICAL MARKETPLACE* 59–79 (1993) (discussing the positive uses of factionalism in the LDP). Mason and Caiger argue that "personal and intergenerational feuds" were responsible for the LDP loss of power in 1993. MASON & CAIGER, *supra* note 100, at 371. Mason & Caiger note that factionalism has historical roots. It was present in party politics after the establishment of the Meiji Constitution and into the Taisho era. *Id.* at 292, 330. See also GORDON MARK BERGER, *PARTIES OUT OF POWER IN JAPAN, 1931–41* 16 (1977) (discussing the oyabun/kobun structure of the po-

necessity, faction leaders are forced to enter into temporary alliances with other factions to implement their policies. "Such alliances, however, are marriages of convenience, lasting for relatively short periods before the leaders' mutually exclusive desires for power lead them to seek new allies."¹⁰⁴ This makes it difficult for any one political leader to bring about sweeping change within even her own party, let alone among others.¹⁰⁵ Recall Sunstein's concern that intra-group dynamics tend to cause polarization in deliberative groups.¹⁰⁶ One could well understand how the need for younger faction members to adopt and support the views of their leaders and to signal loyalty could lead to polarization. Party factionalism within the major Japanese parties indicates deliberative groups are often loose associations of smaller, more cohesive deliberative groups. This raises a question about the ability of such groups to reach consensus. Contact with other deliberative groups may help groups put themselves in the shoes of others and expose them to a wider pool of arguments. If deliberative groups are highly factionalized, however, it is possible such contact will not lead to "better" decisionmaking, as attempts to accommodate the views of another deliberative group could disrupt the equilibrium within one's own group. Further, once a party has taken a particular position regarding defense, fleeting political power may make it difficult to change.

The Diet is controlled by a coalition of the Liberal Democratic Party and the New Komeito. The recent House of Representatives elections greatly strengthened this coalition. As of September 21, 2005, the LDP held 295 of 480 seats in the House of Representatives¹⁰⁷ and 113 of 242 seats in the House of Councillors.¹⁰⁸ The LDP issued a new draft constitution in late October.¹⁰⁹ Consistent with LDP recommendations from the party's inception,¹¹⁰ the LDP draft retains the paragraph 1 war

litical parties during the Taishō and early Shōwa periods); PETER DUUS, *PARTY RIVALRY AND POLITICAL CHANGE IN TAISHŌ JAPAN 169–72* (1968) (discussing internal divisions within the political party, Seiyūkai, during the 1920s).

104. BERGER, *supra* note 82, at 81–82.

105. See, e.g., MIKISO HANE, *MODERN JAPAN: A HISTORICAL SURVEY* 392 (3d ed. 2001) ("Intraparty factionalism kept the LDP from becoming a steamrolling power machine.").

106. See *infra* text accompanying notes 57–63.

107. House of Representatives, Strength of Political Groups in the House of Representatives (Nov. 29, 2005), at http://www.shugiin.go.jp/index.nsf/html/index_e_strength.htm. In addition to the seats held by parties, there are three independent and two vacant seats.

108. House of Councillors, Strength of the Political Groups in the House of Councillors (Oct. 25, 2005), at http://www.sangiin.go.jp/eng/member/f_d_3.htm. In addition to the seats held by parties, there are five independent seats.

109. Jiyūmintō, Shinkenpō sōan [New Draft Constitution], Oct. 28, 2005, at http://www.jimin.jp/jimin/shin_kenpou/shiryō/pdf/051028_a.pdf [hereinafter LDP Draft].

110. Jiyūminshūtō Kenpō Chōsakai [Liberal Democratic Party Constitutional Research Commission], Kenpō Kaisei no Mondaiten [Issues for Constitutional Revision] (Apr. 28, 1956), reprinted in KENPŌ "KAISEI" NO SŌTEN, *supra* note 17, at 535, 537–38 (arguing that while the fundamental spirit of the renunciation of war in paragraph 1 should be maintained,

renunciation clause but confirms the right to engage in self-defense. The draft makes several changes to paragraph 2. First, it clarifies that Japan has the right to maintain a self-defense "military force" (*jiegun*)¹¹¹ under the authority of the prime minister for the purpose of preserving Japanese peace and independence and the safety of the state and its citizens.¹¹² The amendment would thus make expressly constitutional the right of Japan to use force for self-defense and maintain a military to exercise such force. Second, the military force would, pursuant to statute, be permitted to participate in international activities to preserve international peace and security.¹¹³ This change would obviously confirm Japan's ability to engage in UN peacekeeping operations. The draft does not directly address collective self-defense, but the broad amending language could be interpreted as allowing the SDF to engage in such activity to the extent it can be construed as part of international cooperative measures to preserve international peace and security. Finally, the new military force would be permitted by statute to promote public order and protect the lives or freedom of the people.¹¹⁴ These amendments thus attempt to resolve the three major constitutional issues raised by Article 9 (concerning the SDF, the Japan-U.S. security agreement, and UN peacekeeping) by codifying the status quo and taking into account recent legislative expansions of the SDF's emergency powers. Major business organizations¹¹⁵ and the influential Yomiuri Newspaper group share these substantive positions on national security.¹¹⁶

paragraph 2 should be amended to confirm the constitutionality of a defense force bound by the principle of minimum necessary force).

111. This is opposed to the present self-defense force (*jietai*).

112. LDP Draft, *supra* note 109, art. 9, para. 2, clause 1.

113. *Id.* art. 9, para.2, clause 3.

114. *Id.* art. 9, para.2, clause 3. As discussed earlier, the Diet has already passed legislation enabling the SDF to act in emergencies. *See supra* note 28.

115. *See, e.g.,* Keidanren, the Japan Association of Corporate Executives, and the Kansai Association of Corporate Executives. Nippon Keidanren, *Looking to Japan's Future: Keidanren's Perspective on Constitutional Issues* (Jan. 18, 2005), at <http://www.keidanren.or.jp/english/policy/2005/002.html> [hereinafter Keidanren Position Paper] (a translation of a longer Japanese paper, Nippon Keizai Dantai Rengokakai [Keidanren], Waga Kuni no Kihonmondai o Kangaeru [Considering Our Country's Fundamental Issues], at <http://www.keidanren.or.jp/japanese/policy/2005/002/honbun.html#part4>); Keizai Dōyūkai [Japan Association of Corporate Executives], *Atarashii Heiwa Kokka o Mezashite* [Aiming for a New Nation of Peace] (July 1994), in KENPŌ "KAISEI" NO SŌTEN, *supra* note 17, at 145, 156; Kansai Keizai Dōyūkai Anzenhoshō Iinkai [Kansai Association of Corporate Executives Security Committee], *Teigen Shinrai sareru Nihon* [Proposal: A Japan that is Trusted] (Mar. 1994), in KENPŌ "KAISEI" NO SŌTEN, *supra* note 17, at 116, 131–32; Kansai Keizai Dōyūkai Kihonmondai Bukai [Kansai Association of Corporate Executives Basic Issues Section Meeting], *Nihonkoku Kenpō o Kangaeru* [Considering the Constitution of Japan] (Apr. 1994).

116. The Yomiuri Newspaper group has published a series of proposed revisions to the Constitution, beginning in 1994 and extending most recently to 2004. KENPŌ KAISEI: YOMIURI SHIAN 2004NEN [Constitutional Revision: Yomiuri Draft 2004] 327 (Yomiuri Shinbun

The New Komeito,¹¹⁷ the LDP's current coalition partner, holds 31 seats in the House of Representatives¹¹⁸ and 24 seats in the House of Councillors.¹¹⁹ In a policy statement issued in 1999,¹²⁰ the party argued that the renunciation of war in Article 9 must remain the cornerstone of Japanese foreign policy and national security. It supports a strengthened U.S.-Japan security relationship, but it believes collective self-defense is unconstitutional and rejects changing the government's interpretation against collective self-defense. The New Komeito did, however, support legislation that allowed for consolidated response to national threats, including terrorism. It also supports Japanese participation in UN peacekeeping operations and helped in the passage of the Peacekeeping Operations Law.¹²¹

Minshūtō, or the Democratic Party of Japan, holds 112 seats in the House of Representatives¹²² and 82 seats in the House of Councillors.¹²³ In a provisional position paper released in 1999,¹²⁴ Minshūtō, in advance of the establishment of the constitutional research commissions, expressed support for a wide ranging examination of the Constitution and security issues. It accepts what it views to be a consensus among the Japanese people that neither the use of force for self-defense nor the SDF are unconstitutional,¹²⁵ and it accepts the concept of minimum necessary force.¹²⁶ It thus reflects centrist views on defense. Minshūtō also supports Japanese participation in UN peacekeeping operations, but it opposes engagement when the use of force is involved or when the armed forces of individual countries act under Security Council

ed., 2004) (2000 and 2004 proposed drafts) [hereinafter YOMIURI SHIAN 2004NEN]; Yomiuri Shinbun, *A Proposal for the Revision of the Text of the Constitution of Japan*, reprinted in HOOK & MCCORMACK, *supra* note 12, at 55 (1994 proposed draft).

117. The New Komeito and its predecessor, Komeito, emerged from Soka Gakkai, a Buddhist religious movement that gained popularity in the 1950s and 60s. TSURUTANI, *supra* note 103, at 151–53.

118. House of Representatives, *supra* note 107.

119. House of Councillors, *supra* note 108.

120. New Komeito, Key Policy Initiatives (Nov. 4, 2002), available at <http://www.komei.or.jp/en/policy/index.html>.

121. *Id.* ch. 5.2.1. New Komeito appears to leave at least some room for collective self-defense within the Japanese homeland. It argues collective self-defense is “an unacceptable option in any military contingency beyond the borders of Japan.” *Id.*

122. House of Representatives, *supra* note 107. The number also includes the so-called Club of Independents. Minshūtō was formed in 1998 with the combination of four parties: a former Democratic Party of Japan, the Good Governance Party, the New Fraternity Party and the Democratic Party. In 2001, it merged with the Liberal Party, headed by Ichiro Ozawa.

123. House of Councillors, *supra* note 108.

124. DEMOCRATIC PARTY OF JAPAN, THE DEMOCRATIC PARTY OF JAPAN'S BASIC POLICIES ON SECURITY (Provisional Version) (June 1999) available at <http://www.dpj.or.jp/english/policy/security.html>.

125. *Id.* § II(2).

126. *Id.* § II(6)3.

resolutions.¹²⁷ The party supports the U.S.-Japan security agreement, but its policy has been to oppose collective self-defense¹²⁸ and it considers this issue irresolvable by a change in the government's interpretation of Article 9.¹²⁹ In a more recent foreign policy statement by Minshūtō's former president, Okada Katsuya, the party supports furthering cooperation with the United States in peacemaking and nationbuilding in the Asia-Pacific Region, but it calls for SDF deployments to be made under the United Nations framework in other regions, including the Middle East and Africa.¹³⁰ A proposed draft set of revisions to the Constitution is expected in early 2006.

The JCP has nine seats in both the House of Representatives and the House of Councillors.¹³¹ The party has consistently opposed Japanese rearmament and calls for what it terms the complete implementation of Article 9, including the abrogation of the U.S.-Japan Security Treaty and the dismantling of the SDF.¹³² It has been active in organizing public opposition to changes to Article 9 by sponsoring public events opposing amendments and locally organized Article 9 clubs.

The SDPJ, as discussed earlier, is a remnant of the JSP. It has seven seats in the House of Representatives and six seats in the House of Councillors.¹³³ The SDPJ opposes any changes to or reinterpretations of Article 9 that would give the SDF constitutional status or would allow the SDF to be deployed abroad, even under UN auspices.¹³⁴

It is important to note that the public has largely resisted amendments throughout most of the history of Article 9. Popular opinion in Japan continues to oppose militarism; however, polls have shown recent changes. According to a survey conducted by the Asahi Shinbun (a major Japanese newspaper) in 2001, most Japanese were in favor of revisions to the Constitution, but over 70 percent opposed amendments

127. *Id.* § II(4).

128. *Id.* § II(6)4.

129. *Id.* § II(5).

130. Okada Katsuya, 'Hirakareta Kokueki' o Mezashite: Ajia soshite Sekai to tomo ni Ikiru [Aim at an Open National Interest: To Live Together with Asia and then the World] at 11-12 (May 18, 2005), available at <http://www.dpj.or.jp/vision/honbun.pdf>. Although Minshūtō supports continuing relations with the United States, it argues Japan should not support post September 11th U.S. unilateralism and preemptive strikes. *Id.* at 11-12.

131. House of Representatives, *supra* note 107; House of Councillors, *supra* note 108.

132. JAPANESE COMMUNIST PARTY, PROGRAM OF THE JAPANESE COMMUNIST PARTY art. 12 (Jan. 2004), available at http://www.jcp.or.jp/english/23rd_congress/program.html.

133. House of Representatives, *supra* note 107; House of Councillors, *supra* note 108.

134. SHAMINTO, KENPŌ O MEGURU GIRON NI TSUITE NO RONTENSEIRI [A COMPENDIUM OF ISSUES CONCERNING THE DEBATES SURROUNDING THE CONSTITUTION] available at <http://www5.sdp.or.jp/central/topics/kenpou0310.html> (last visited March 10, 2005).

to Article 9.¹³⁵ Recent surveys indicate that resistance to revising Article 9, while still strong, has waned. The Yomiuri Shinbun reported that in a poll conducted in April 2005, 61 percent of respondents favored revising the constitution to reflect changing times, although only 44 percent of respondents favored revisions to Article 9.¹³⁶ In another survey conducted in June 2005 by the Tokyo Shinbun, 42 percent of respondents said there was no need to revise Article 9, while 35 percent said revisions were necessary.¹³⁷ Of those who support change, 48 percent want the constitutionality of the SDF established, 29 percent want the SDF to be able to participate in international cooperation, and 20 percent said limits should be placed on the use of force.¹³⁸ Of those polled, 59 percent opposed the right of collective self-defense.

B. The Process

The Japanese understanding of law as a product of consensus underscores a deep concern for process. In describing ordinary statutes, Haley writes: "Once enacted as legislation, legal rules acquire as a result at least the perception of consensus an exceptional legitimating influence. Even the most initially controversial legal rules, if enacted after a long period of discussion and debate, can be viewed as an expression of national community agreement."¹³⁹ This emphasis on discussion and debate—and the legitimacy that derives from it—reflects two concerns: first, that every issue be considered thoroughly; and second, that everyone be heard.

In that vein, as constitutions set out the major structural features of a polity, they also impose amendment requirements that often place a drag on the alteration of the structure by ordinary political processes. Under Article 96, amendments to the Japanese Constitution require the two-thirds vote of each house in the Diet and ratification by the people through majority vote at a special referendum or election.¹⁴⁰ Although these requirements do not appear to be particularly onerous when

135. *Commission Report Should Spark Public Debate*, ASAHI SHINBUN (Nov. 4, 2002). See also Shimoyachi Nao, *Public More Gradually Accepting of Constitutional Change*, JAPAN TIMES (May 3, 2004), (reporting that polls indicate a majority favors revisions to the constitution but opposes changes to Article 9).

136. *61% Support Constitutional Revision*, THE DAILY YOMIURI (Apr. 8, 2005), at 2.

137. *64% Say Revision Constitution is Necessary: Poll*, Japan Policy & Politics, TOKYO SHINBUN (June 13, 2005).

138. *Id.*

139. HALEY, *supra* note 81, at 36.

140. KENPŌ, art. 96. At present, this would require 320 out of 480 votes in the House of Representatives (including the two vacant seats) and 162 out of 242 votes in the House of Councillors (rounding up).

compared to other constitutions,¹⁴¹ they have set a high bar in the Japanese context. Several commentators observe how the distribution of power among Japan's parties has made it very difficult to amend the Constitution. As discussed earlier, the once powerful JSP was opposed to remilitarization for decades, and the JCP remains so. Honda Akihiro observes that even during the period when the LDP was clearly dominant, it never held enough seats to meet the two-thirds requirement.¹⁴² In his assessment of the unsuccessful attempt to revise the Constitution in the 1950s and 1960s, John Maki attributes this failure in part to the inability of the LDP to clear the two-thirds hurdle.¹⁴³

Given these political constraints, great care has been taken to ensure there is sufficient agreement to meet the two-thirds and majority vote requirements. For the LDP and the New Komeito, this task is easier following the September elections because the coalition now has enough seats in the House of Representatives to meet the two-thirds requirement. At the same time, this is not the case in the House of Councillors. In this sense, Article 96 has functioned as a precommitment device as understood by Elster. It has slowed proceedings, and the achievement of the two-thirds vote in the House of Councillors and a majority vote in a referendum will require negotiation among the various deliberative groups in Japan. Moreover, this process resonates well with the Japanese value on consensus in lawmaking and the legitimizing effect consensus-based procedures have on the resulting laws.¹⁴⁴ Any amendment that survives the Article 96 process will probably receive broad

141. The U.S. Constitution, for example, requires that two-thirds of both houses of Congress or two-thirds of the legislatures of the states propose any amendments, and that such amendments be ratified by three-fourths of the states, either through their legislatures or through constitutional conventions. U.S. CONST. art. V. Honda Akihiro, relying on a study by the National Diet Library of 71 national constitutions, points out that 61 countries require super majority votes of the relevant legislative bodies to amend their constitutions. Countries like Brazil require a three-fifths majority, and Mongolia requires a three-fourths majority vote. Honda Akihiro, *Dai 96 jō: Kaisei ni wa takai haadoru* [Article 96: for amendments, a high hurdle] CHUNICHI SHIMBUN, available at <http://www.tokyo-np.co.jp/nihonkokuk/txt/20050617.html>. Honda also observes since the end of the Second World War, Germany has revised its constitution 51 times, and Italy has revised its constitution 13 times. Of the 71 nations, only Japan and Denmark have not amended their constitutions. *Id.*

142. Honda, *supra* note 141. An LDP attempt in 1956 to obtain a greater majority by proposing that the electoral system be changed to a single-member constituency system was met with severe criticism. SIMS, *supra* note 95, at 277–78.

143. John M. Maki, *Introduction* in JAPAN'S COMMISSION ON THE CONSTITUTION, *supra* note 32, at 9.

Honda also points out there are still no set provisions for the public referendum in place. Honda *supra* note 141.

For a discussion of the debates concerning amendments to Article 96, see House of Representatives CRC Final Report *supra* note 1, at 444–50; House of Councillors CRC Final Report *supra* note 1, at 213–17.

144. See *supra* text accompanying notes 78–81.

acceptance, not necessarily because of broad agreement on the substance of the amendment, but because the negotiations between parties, as required by the clause, give the amendment legitimacy within the Japanese political environment.

At the same time, Article 96 may have negative effects, an unintended consequence inherent in heuristic tools. Depending on the social setting, formal requirements for amendment in combination with too many deliberative groups might lead to deadlock instead of consensus. If it is too difficult to amend a constitution, the document risks being unresponsive to the felt needs of a society and thereby losing legitimacy. Some groups in Japan criticize Article 96 for this reason and press for revisions to that article.¹⁴⁵ Moreover, in the case of Japan, it can be argued that the difficulty of amending the Constitution, coupled with the Japanese judiciary's decision not to weigh in on defense matters,¹⁴⁶ has contributed to the perpetuation of the interpretive controversies discussed in Part I and has in turn raised questions about the effectiveness and legitimacy of Japanese constitutionalism and of Japanese law in

145. See, e.g., Institute for International Policy Studies, *Proposal Concerning Revision of the Constitution of Japan* 4 (2005); Keidanren Position Paper, *supra* note 115. This does not mean Article 96 is the sole reason for the caution with which the Japanese leadership is approaching this process. Some of the care can be attributed in part to fears of an adverse reaction from the public. See, e.g., SIMS, *supra* note 95, at 339 (arguing that the LDP refrained from seeking amendments to the constitution out of fear of public backlash and the reaction of the opposition parties).

146. The Constitution of Japan expressly provides for judicial review, KENPŌ, art. 81, and from time to time cases have been brought that have challenged the constitutionality of the SDF or the presence of U.S. bases in Japan. However, the Supreme Court has usually used a form of the political question doctrine to find that these kinds of controversies are not within the competence of the courts. In *Sakata v. Japan* (The Sunakawa Case), 13 KEISHŪ 3225 (Sup. Ct., Dec. 16, 1959), the Supreme Court of Japan overturned a decision of the Tokyo High Court and found Article 9 did not prevent Japan from entering into security arrangements with another country. However, it also found it was beyond the scope of judicial review to determine whether the presence of U.S. military bases in Japan violated Article 9. In *Minister of Agriculture, Forestry and Fisheries v. Ito* (The Naganuma Nike Missile Site Case II), 27 GYŌSAI REISHŪ 1175 (Sapporo High Ct. Aug. 5, 1976), the Sapporo High Court found the question of whether the Self-Defense Force was constitutional under Article 9 was a question of state governance and a political act. These remarks should not be taken as a criticism of the Japanese judiciary. The Japanese courts are certainly not the only ones that defer to the political branches in defense and foreign policy. In the United States, for example, courts have often used doctrines, such as political question and standing, to refrain from intervening in government actions when national security or defense policy is involved. In the U.S. context, this deference is due in large part to the language of the U.S. Constitution, which expressly empowers the executive and legislative branches to conduct foreign affairs; to the recognition that the political branches, particularly the executive branch, are better equipped and structured to frame U.S. foreign and defense policy; and because the political branches are more directly accountable to the people for foreign policy decisions. Such factors hold true in Japan as well. It is unclear whether any country has answered to everyone's satisfaction what role, if any, the courts should or can play when foreign and defense policies are involved.

general.¹⁴⁷ Article 96 thus has the potential to harm the Japanese Constitution as well as to protect it.

Because of the high bar set by Article 96, one understands why the Japanese leadership began its public consideration of revisions by establishing the two constitutional research commissions.¹⁴⁸ Constitutional study groups and research commissions are tools for consensus with precedents that reach back to the Meiji Restoration, when the Japanese government commissioned study groups to investigate other constitutions. This in turn had a major impact on the shape and content of the Meiji Constitution.¹⁴⁹ The last national constitutional research commission (often referred to in the literature as the government constitutional research commission) was active from 1957–1964.¹⁵⁰ The precedents for

147. I assess these criticisms more fully in Part III.D. *See infra* text accompanying notes 237–244.

148. The present constitutional research commissions were established under amendments to the Diet Law in 2000. Article 102-VI of the law provides: “To conduct broad and comprehensive research on the Constitution of Japan, a Research Commission on the Constitution shall be set up in each House.” Article 9 was just one issue under consideration by the research commissions. The commissions were charged with engaging in far-reaching inquiries that touched every aspect of the constitution. This included the Constitution’s drafting history; the role of the Constitution in contemporary Japanese society; interpretive issues raised by subsequent constitutional history; the meaning and significance of the preamble to the Constitution; the emperor system; national security and international cooperation; human rights; the political sector (including the Diet, the cabinet, political parties, and the various ministries); the judiciary; finance; the role of local government; the procedures for constitutional amendments; judicial review; and the means for addressing national emergencies. House of Representatives CRC Final Report, *supra* note 1, table of contents (no pagination in original); House of Councillors CRC Final Report, *supra* note 1, at xxiii–xxvii. The 1957–64 research commission engaged in the same type of investigations and deliberations. JAPAN’S COMMISSION ON THE CONSTITUTION *supra* note 32, at 47–61. Records of both research commissions are available on the Internet. The House of Representatives Constitutional Research Commission website is located at http://www.shugiin.go.jp/index.nsf/html/index_kenpou.htm. (The site contains the Final Report, information about the commission, testimony transcripts and submissions, and reports prepared for the commission by commission staff. The commission also maintains an English website at http://www.shugiin.go.jp/index.nsf/html/index_e_kenpou.htm.) The House of Representatives site contains unofficial English translations of commission proceedings. The commission published an interim report in November 2002 in English. House of Representatives Research Commission on the Constitution, Interim Report (Nov. 2002). The House of Representatives Interim Report also contains summaries of testimony given before the commission. The House of Councillors Research Commission website is located at <http://www.sangiin.go.jp/japanese/kenpou/index.htm> and contains similar transcripts and reports. As of this writing these records were not available in English.

149. The emphasis on study reaches back to the beginnings of the Japanese state, when missions were sent to China as Japan was trying to establish its first legal system. Envoys were sent to China as early as 425 C.E. and scholars sent to China to study Chinese society and religion participated in the social and legal reforms that transferred power from the clan leaders to the emperor in the 600s. *See* W.G. BEASLEY, *THE JAPANESE EXPERIENCE: A SHORT HISTORY OF JAPAN* 13–23 (1999).

150. An abridged version of the final report of the 1957–64 commission has been translated into English. JAPAN’S COMMISSION ON THE CONSTITUTION, *supra* note 32.

the research commissions of 2000–2005 make any resulting changes more acceptable by reminding the public that such groups have played similar roles in prior stages of Japan's history.

While the government constitutional research commission failed to bring about any changes to the Constitution, even this failure has its uses. To the extent the Japanese public and other constituent groups are ambivalent about amending the Constitution, the establishment of the current research commissions is a relatively benign way to begin a serious discussion about this difficult topic. Given the history of the last commission, there was no implication that the establishment of a new commission would necessarily lead to amendments.¹⁵¹ Moreover, the decision that the commissions would not themselves propose formal amendments also serves the purposes of reassuring the public, slowing the process down, and ensuring that there will be yet another round of debate and negotiations as formal amendments are submitted to the Diet. If the work of the research commissions results in eventual amendments to Article 9, it will seem obvious their five-year period of research and discussion was not necessarily intended to help Japan “get it right” but instead served to ensure broad acceptance for any final decision.¹⁵²

151. There are two major differences between the government constitutional research commission and the present commissions. First, it reported to the cabinet instead of the Diet. This was criticized by the JSP as unconstitutional because the Diet, not the cabinet, proposes amendments. Second, the JSP which was then the major opposition party, did not participate in the 1954–1964 commission. It argued that the commission had been established with the presumption that amendments would be made. Naitō Mitsuhiro, *Seifukunpōchōsakai ni arawareta Kaikenkōzō to Chōsakai Hihan* [The Structure of Constitutional Revision as Revealed in the Government Constitutional Research Commission and a Critique of Research Commissions] in ZENKOKU KENPŌ KENKYŪKAI KENPŌKAISEI MONDAI [PROBLEMS IN CONSTITUTIONAL REVISION] 48, 48–49 (2005) [hereinafter KENPŌKAISEI MONDAI]. Naitō argues that the failure of the 1957–1965 commission to bring about amendments had the negative affect of causing the government through the 1990s to amend the Constitution through reinterpretation, thus leaving the Constitution vulnerable to accusations that it was an empty shell. *Id.* at 52. The argument that the Constitution has been amended by government interpretation has its origins in the 1950s when Japan began to rearm. Watanabe Yasuyuki, *Kenpō no Kaishaku to Kaisei* [Constitutional Interpretation and Amendment], JURISTO, May 1–15, at 9 (2005) (describing the origins of the amendment by interpretation debate). See also Nagaoka Tōru, *Kenpo Rinen no Teichaku to Kaishakukaiken no Jidai* [The Establishment of the Idea of the Constitution and the Era of Constitutional Amendment Through Interpretation], in KENPŌKAISEI MONDAI, *supra*, at 53 (discussing the constitutional amendment through interpretation debate, particularly from the 1960s through 1980s).

152. The current commissions have their critics. Kobayashi Takeshi fears that the commissions will reject an understanding that the Constitution, as the work of the people, guides politics, and instead will bow to political necessity, since the commissions were initiated by an administration that has, in his view, violated the Constitution by sending forces abroad in support of the Iraqi invasion and occupation. Kobayashi Takeshi, *Kenpō no “Chōsa” to “Kaisei”* [“Research” and “Revisions” to the Constitution], 15 KENPŌ MONDAI 150, 155–56 (2004). The Kenpō Kaiaku Sōshi Kakukai Renraku Kaigi is also critical of the commissions’

C. Bricolage in the Substantive Debate

Both legal restraints and a penchant for consensus require the various deliberative groups in Japan to engage with one another. Is consensus emerging from this process? The Japanese are involved in a far-ranging and thorough examination of the substantive issues relevant to changing Article 9. These issues include: the value of pacifism to Japan; the history of the framing and subsequent interpretation of Article 9; Japan's security needs; the importance of the U.S.-Japan security relationship (including the impact of the U.S. military presence in Japan, particularly Okinawa); the value of Japan's participation in the United Nations and its activities; the impact any changes will have on Japan's relations with other countries; civilian control over the military; and the role of the military in emergencies. On a more technical level are issues regarding the proper balance between text and interpretation: to what extent does the resolution of Japan's security issues require changes to the text of Article 9 and to what extent can it be left to interpretation?

Space does not allow for discussion of all these issues, or of all the arguments being raised for and against the various solutions being offered. It is apparent the major deliberative groups support retaining the war renunciation clause in paragraph 1,¹⁵³ while collective self-defense remains controversial. To show how bricolage affects the substance of the debate, I will focus on the use of force for self-defense. Four views on this issue emerged from the House of Representatives Constitutional Research Commission: first, the Constitution should be amended to clarify the constitutionality of the SDF and the right to use force for self-defense; second, provisions governing the SDF and the exercise of the right of self-defense should be added to the Constitution; third, Article 9 should remain unchanged while the principle of minimum

work. Like Kobayashi, the organization argues that the commissions, from the beginning, were predisposed to recommend amendments to the Constitution. It further argues that both research commissions went well beyond their legislative mandate to engage in far-reaching investigations on the Constitution. It also claims the final reports fail to adequately represent the extent to which the public strongly supports Article 9. *Shusan Kenpō Chōsakai no Hōko-kusho Teishutsu ni Atatte* [Concerning the Release of the House of Representatives, House of Councillors Constitutional Research Commissions' Final Reports] (2005). See also Tsukada Noriyuki, et al., *Kokkai Kenpō Chōsakai* [The Diet Constitutional Research Commissions] in *KENPŌKAISEI MONDAI*, *supra* note 151, at 76 (describing similar criticisms).

153. See *supra* text accompanying notes 82–134. This was also confirmed in the commission final reports. As the House of Councillors Report puts it, "*Heiwashugi no igi, rinen o kenji subeki koto wa kenpō chōsakai ni okeru kyōtsū no ninshiki deatta.*" ["It was the consensus of the constitutional research commission that [we] should hold fast to the meaning and idea of pacifism."] House of Councillors CRC Final Report, *supra* note 1, at 66 (emphasis in original). See also BEER & MAKI, *supra* note 4, at 115 ("Political parties and opinion leaders have now nearly reached a consensus on support for Paragraph 1 of Article 9 but not on Paragraph 2 or its proper interpretation.").

necessary force for self-defense is affirmed; and fourth, Article 9 should continue to prohibit the use of force in exercising the right of self-defense.

Members of the House of Councillors Constitutional Research Commission agreed that Japan, as an independent sovereign nation, has the right to independent self-defense.¹⁵⁴ Unlike the House of Representatives commission, the House of Councillors commission was in agreement that it is necessary to have an organization like the SDF through which Japan can exercise the minimum force necessary for self-defense. Like the House of Representatives commission, however, it was divided on whether the constitutionality of such an organization should be made express.¹⁵⁵ Thus, although it appears there is a growing consensus that Japan has or should have the right to use force to defend itself, there is at least a significant minority that opposes this, and even among those who agree on the issue of self-defense, there is currently no consensus about whether revisions to Article 9 should be made.

The question arises as to whether further movement towards consensus on these issues is possible. Sunstein writes, "When people have a fixed view about some highly salient public issue, they are likely to have heard a wide range of arguments in various directions, producing a full argument pool, and additional discussion is not likely to produce movement."¹⁵⁶ This identifies a problem with using the deliberation process to assess various argument pools. Aikyō Kōji, who also applies a precommitment framework to the amendment debates, argues that allowing the constitution to function as a precommitment device enables Japan to fully evaluate the various arguments for and against amendments to Article 9.¹⁵⁷ Aikyō, who favors a pacifist interpretation of Article 9, contends this is particularly important in the post-9/11 world when others claim it is urgent for Japan to increase its defense capability.¹⁵⁸ Sunstein's comment, however, raises yet another issue: if a constitutionally mandated process requires too much time, it may allow people to form counterarguments to opposing arguments and thereby become even more entrenched in their positions. The waxing and waning of the debates about Article 9 over the past 60 years makes this a real possibility.¹⁵⁹ Under those circumstances, coming up with fresh

154. House of Councillors CRC Final Report, *supra* note 1, at 73.

155. *Id.* at 80.

156. SUNSTEIN, *supra* note 2, at 29.

157. Aikyō Kōji, *Kenpō ni yoru Purikomitmento* [Precommitment Through the Constitution], JURISTO, May 1–15, at 2, 7 (2005).

158. *Id.* Aikyō also describes the work of Hasebe Yasuo, who argues Article 9 functions as a precommitment device that prevented a return to militarism. *Id.* at 6–7.

159. For example, in 1962, Kobayashi Naoki wrote that the debate on Article 9 had become tiresome and that the arguments by the various parties were well known. Kobayashi

arguments is difficult. Three of the recurring themes arising in the debates on the issue of self-defense—the drafting history of Article 9; limits on constitutional revisions; and the perennial yet ever-changing nature of threats to national security—show how bricolage in substantive debates makes consensus challenging.

1. The Drafting History of Article 9

Anyone who studies the establishment of the postwar Constitution cannot help but be struck by the drama of the events as they unfolded. Many of them have taken on a mythic quality: the Potsdam Declaration's vision for a postwar Japan;¹⁶⁰ the utter devastation following the war;¹⁶¹ the Emperor's first radio address to the people announcing surrender;¹⁶² the force of Douglas MacArthur's personality;¹⁶³ the Mainichi Shinbun's premature publication of the Matsumoto committee's draft constitution, a draft unacceptable to the Allies;¹⁶⁴ MacArthur's decision that the Supreme Command for the Allied Powers (SCAP) General Headquarters (GHQ) Government Section would draft a "model" constitution of its own;¹⁶⁵ his three points, including the renunciation of war;¹⁶⁶

Naoki, *Kaikenron no Ronri to Shinwa* [The Logic and Myth of the Constitutional Revision Issue], SEKAI No. 193, reprinted in KENPŌ KAISEI SEIRON [Constitutional Revision: Arguments] 201, 208 (Hasegawa Masayasu & Mori Hideki eds. 1977). He then responded to a number of arguments made in favor of amending the constitution. Several of the arguments and Kobayashi's responses are used today. For example, Kobayashi rejected an argument that as an independent country, it is natural for Japan to have a military. *Id.* at 209. He argues through Article 9, Japan has taken the initiative by deciding not to maintain armed forces. *Id.* at 209. Variations of this argument and counterargument were made before the current research commissions. See House of Representatives CRC Final Report, *supra* note 1, at 303–05.

160. Proclamation Calling for the Surrender of Japan, Approved by the Heads of Government of the United States, China, and the United Kingdom (July 26, 1945) in 2 FOREIGN RELATIONS OF THE UNITED STATES: CONFERENCE OF BERLIN (POTSDAM) 1945, at 1474 (U.S. Dep't of State, 1960).

161. See DOWER, *supra* note 4, at 45–64 (discussing conditions in Japan following surrender).

162. This was the first time that the emperor had directly spoken to his subjects. For a discussion of the speech and its impact, see *id.* at 33–39.

163. General MacArthur was Supreme Commander of the Allied Powers in Japan. As Mikiso Hane puts it, "[t]he strong personality of General MacArthur made the occupation of Japan a one-man show. Still, his forceful leadership, self-assurance, dignified bearing, sense of mission, and astute political acumen won him the respect of the Japanese." HANE, *supra* note 105, at 367.

164. The committee, headed by the eminent legal scholar, Matsumoto Jōji, was charged with revising the Meiji Constitution. It produced a draft whose provisions for civil liberties were not satisfactory to the Allies. DOWER, *supra* note 4, at 351–55. This draft was published in the Mainichi newspaper without permission of the committee. *Id.* at 359.

165. *Id.* at 360.

166. See *infra* text accompanying note 188. The speed with which the Constitution was crafted lends credence to Tushnet's observations about bricolage in constitutional design: "A

the completion of the GHQ draft within six days;¹⁶⁷ the surprise of the Japanese leadership as they were presented with the English draft;¹⁶⁸ the “translation marathon”¹⁶⁹ as SCAP and the Japanese hammered out a Japanese version;¹⁷⁰ the presentation of the draft to the public;¹⁷¹ the Diet debates;¹⁷² the Ashida Amendment;¹⁷³ and approval by the Privy Council and the Emperor.¹⁷⁴ It is not surprising that a significant portion of the work of both the 1957–1964 and 2000–2005 commissions involved studies of the Constitution’s origins or that the intentions of the framers continue to inform Japanese jurisprudence.

Like all cultural tools, history (as well as other types of narratives), has both positive and negative effects. To quote Balkin at length:

Narratives are useful memory structures precisely because they select and organize our experience—they categorize and store events into scripts or indices that we can use for later comprehension and comparison. Narratives are useful tools [for] understanding because they create social expectations that frame our understanding of what is and should be happening; without such expectations, we literally would not know what to expect.¹⁷⁵

Despite their usefulness, narratives have their limitations.

Because narrative structures work in these ways, they necessarily lead our understanding in some directions rather than others. They categorize future experience in terms of preexisting indices and expectations. This produces the familiar trade-off of any heuristic—although these expectations may be good enough for some purposes, they may seriously hinder our understanding and promote injustice in others.¹⁷⁶

constitution is assembled from provisions that a constitution’s drafters selected almost at random from whatever happened to be at hand when the time came to deal with a particular problem.” Tushnet, *supra* note 67, at 1287.

167. DOWER, *supra* note 4, at 364–73 (discussing the GHQ drafting session).

168. *Id.* at 374–75.

169. This is John Dower’s term. *Id.* at 379.

170. *Id.* at 379–83.

171. *Id.* at 383–87.

172. *Id.* at 391–404.

173. See *infra* text accompanying notes 194–198.

174. Lawrence W. Beer, *The Present Constitutional System of Japan*, in CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 175, 180 (Lawrence W. Beer ed., 1992).

175. BALKIN, *supra* note 3, at 208–09.

176. *Id.* at 208–09.

As an example of how narratives can direct yet limit one's understanding, consider the following summary of the report of the 1957–1964 Constitutional Research Commission Subcommittee on the Process of the Enactment of the Constitution after it had recounted the drafting history: “In essence, it is clear that the Constitution of Japan is the product of a lost war,” the military occupation, and the destitution of the people.¹⁷⁷ In reflecting on those turbulent times, the subcommittee stated:

[T]he process of the enactment of the Constitution was both extremely peculiar and abnormal and the facts were extremely complex. In respect to the problem of whether the process was either imposed or forced on Japan or, in other words, whether it was based on the freely expressed will of the Japanese people, the facts are by no means simple.¹⁷⁸

Thus, at least two themes emerge from the 1957–1964 commission account. First, despite the vague language, the strong implication is that the Constitution was forced on the Japanese people, and its legitimacy is thereby in question. The second theme, that the process was jury-rigged, strengthens this criticism. The subcommittee uses a narrative of unusual circumstances and unexpected twists and turns to show the story does not develop as one might expect. The report is clear on this point: “[T]he enactment of this Constitution was carried out in an extremely unusual manner, if one considers what the form of enactment of a nation's constitution should actually be.”¹⁷⁹

The 1957–1964 report is a more subtle version of a narrative of imposition widely debated in the 1950s and 1960s and continuing to this day. In 1954, for example, the Jiyūtō political party argued the government's position (that Japan has the right to defend itself under international law but cannot do so under Article 9) was a foolish one that could only be taken by a completely defeated country such as Japan.¹⁸⁰ In 1994, Ichiro Ozawa could still say, “it seems abnormal to me that a constitution imposed by the occupation authorities continues to function after Japan has become an independent nation.”¹⁸¹ This narrative's strength is that it captures a truth about the Constitution in general

177. JAPAN'S COMMISSION ON THE CONSTITUTION, *supra* note 32, at 85–86.

178. *Id.* at 86.

179. *Id.*

180. Jiyūtō Kenpō Chōsakai [Liberal Party Constitutional Research Commission], Nihonkokukēn pō Kaiseian Yōkō Narabi ni Setsumeisho [Outline and Explanation of Proposed Revisions to the Constitution of Japan] (Nov. 5, 1954), *reprinted in* KENPŌ “KAISEI” NO SŌTEN, *supra* note 17, at 502, 509.

181. Ozawa Ichiro, *A Proposal for Reforming the Japanese Constitution*, *reprinted in* HOOK & MCCORMACK, *supra* note 12, at 161.

and Article 9 in particular: they *were* imposed by a foreign occupation, and the way in which they were imposed runs counter to Japanese values on deliberation and consensus. That fact leads to the argument that the document failed to take into account other Japanese values and served occupation interests as much as or more than Japanese interests.¹⁸² The imposition narrative thereby creates momentum in favor of questioning the legitimacy of the Constitution and of amending it to make it more Japanese.

Despite its strengths, however, the narrative of imposition has at least two weaknesses. First, it masks Japan's oppressive past. One critic of the argument states:

As for those who use the constitutional issue of imposition as a reason for establishing an independent one, I would like them to answer: in reality, which is more desirable for human life and activity—the institutionalized protections of popular sovereignty, fundamental human rights, and pacifism now ours—or, a national system under the Constitution of the Empire of Japan, with supreme authority in the emperor, an oppressive system aided by the Peace Preservation Laws and the Imperial Rule Assistance Association, governmental authorities that ignored established legal procedure, and women tied to the household system without political protection?¹⁸³

Second, the imposition theory runs counter to another narrative. Although the Allies had tremendous influence in the establishment of the Constitution, the vast majority of the Japanese citizenry, who felt betrayed by the wartime leadership,¹⁸⁴ quickly embraced the new Constitution, including Article 9. The values implicit in the Constitution have become ingrained in Japanese society over the past 60 years, in part, precisely because of Article 9. As John Dower puts it, “[a]lthough Article 9 has been battered and bent to permit an increasingly expansive interpretation of what is permissible in the name of maintaining a ‘self-defense’ capacity, it has survived (together with the strong antiwar

182. Arguments to that effect were made before the commissions. See House of Representatives CRC Final Report, *supra* note 1, at 254; House of Councillors CRC Final Report, *supra* note 1, at 41–42.

183. House of Representatives CRC Final Report, *supra* note 1, at 256. The Peace Preservation Law was actually a series of laws used to quell domestic unrest and dissent. See MASON & CAIGER, *supra* note 100, at 290, 319, 331. The Imperial Rule Assistance Association was established after the political parties were dissolved in 1940 and was designed to inculcate the general populace with national policies and values. IAN BURUMA, *INVENTING JAPAN: 1853–1964*, at 113 (2003).

184. DOWER, *supra* note 4, at 65–84.

language of the preamble) as a still-compelling statement of nonbelligerency.”¹⁸⁵ He observes further:

[E]very contretemps about rearmament has necessarily entailed reengagement with basic issues of war and peace (and law and constitutional guarantees in general) in a way inconceivable elsewhere. In such unplanned ways, the early occupation ideals of ‘demilitarization and democratization’ have remained a living part of popular consciousness for over a half-century.¹⁸⁶

Thus, two competing narratives of the Constitution’s origins continue to vie for influence in the revision debates.

Different narratives also appear in the debates about the interpretation of Article 9, particularly regarding whether or not the article allows Japan to use force for self-defense. It is well understood that the intent of the drafters, assuming it can be determined, is not necessarily as important in interpreting a document as are the actual language and subsequent applications of the document.¹⁸⁷ Nevertheless, many are still

185. *Id.* at 562. The theme of acceptance and assimilation was brought up as early as six years after the constitution was established and continues today. Asahi Shinbun, no Chōtōhateki Kenpōshingi Kikan Setchi Teian [Non-partisan Constitutional Investigation Group Establishment Proposals], May 3, 1953, *reprinted* in KENPŌ “KAISEI” NO SŌTEN, *supra* note 17, at 472, 473 (arguing that when the Constitution was established the large majority of the people probably expressed heartfelt agreement with the spirit of democracy which lies at the bottom of the Constitution). See also Masami Ito, *The Modern Development of Law and Constitution in Japan* (Keiko Beer & Masako Kamiya trans.), in CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 129, 144 (Lawrence W. Beer ed., 1992) (“Even though it was drafted by foreigners, the Constitution of 1947 has enjoyed the general support of the public and is considered the most suitable postwar constitution for Japan, preferable to all the other constitutional drafts by Japanese, including that of the Japanese Government.”). Yoichi Higuchi argues that “without constitutionalism, Japan could not have achieved modernity.” Yoichi Higuchi, *The 1946 Constitution: Its Meaning in the Worldwide Development of Constitutionalism in FIVE DECADES OF CONSTITUTIONALISM* *supra* note 4, at 3. For Higuchi, the Constitution did so by placing greater value on the individual: “As the ultimate legal authority, it validated reforms in Japan’s social and economic structures that undergirded postwar democracy. The Constitution designed a society around an intellectual value—respect for the individual—that replaced veneration for the emperor.” *Id.* at 5. Land reform, labor law, and women’s rights were all anchored in constitutional provisions. *Id.* at 5–6. Another argument raised at the commission hearings was that during the war, Japan strayed from the path of freedom, peace, and human rights. Defeat and the new Constitution marked a return to that path. House of Councillors CRC Final Report, *supra* note 1, at 42. On a more mundane level, there is the argument that regardless of who was responsible for the first draft, GHQ and the Japanese leadership worked together to make the final product. House of Representatives CRC Final Report, *supra* note 1, at 255. Arai Akira made the same argument in 1981. ARAI AKIRA, KENPŌ DAIKYŪDŌ TO ANPO, JIETAI [Article 9 of the Constitution and the Japan-U.S. Security Agreement, Self Defense Force] 30 (1981).

186. DOWER, *supra* note 4, at 562.

187. Some members of the House of Councillors Constitutional Research Commission were very much prepared to move beyond the question of origins to questions about what the

concerned with what the Allies and the Japanese leadership intended. One of the best known arguments raised in favor of the use of force is that although General MacArthur instructed the GHQ Government Section to provide that Japan was to renounce war “even for preserving its own security,”¹⁸⁸ an express provision to that effect never made it into the GHQ draft. Iokibe Makoto argues, based on interviews with Charles Kades (who was responsible for drafting Article 9), that Kades worried that requiring Japan to renounce force even for self-defense was too drastic. If such language was put into the document, the Japanese government would quickly repeal the whole Constitution once occupation ended, thus jeopardizing many of the new reforms written into the draft. To ensure the Constitution’s survival, the drafters omitted the language (according to Iokibe) with the approval of MacArthur and Courtney Whitney, head of the GHQ Government Division.¹⁸⁹

Iokibe further argues that the GHQ’s true intentions were never communicated to the Japanese leadership. This allows him to claim the GHQ never intended to deny Japan the right to use force in its defense and simultaneously explain how so many among the Japanese leadership believed the final draft did just that,¹⁹⁰ as evidenced by Prime Minister Yoshida’s famous statement during the Diet debates on the draft.¹⁹¹ But Iokibe’s account does not (and in fairness to Iokibe does not purport to) explain whether the understanding of the GHQ or that of the Japanese leadership is controlling.¹⁹² One could argue that if the Diet, as the body that debated and approved the Constitution (subject to the approval of

Constitution has meant over the past 50 years and what it means for the future. House of Councillors CRC Final Report, *supra* note 1, at 41.

188. MacArthur Notes (Feb. 4, 1946), available at <http://www.ndl.go.jp/constitution/e/shiryo/03/072shoshi.html>.

189. *House of Councillors CRC Remarks of Experts*, *supra* note 5, at 294 (remarks of Iokibe Matoto). Kitaoka Shinichi agrees that MacArthur’s instruction was omitted because Kades thought such a restriction was too drastic. House of Representatives CRC Final Report, *supra* note 1, at 267.

190. *House of Councillors CRC Remarks of Experts*, *supra* note 5, at 294 (remarks of Iokibe Matoto).

191. Yoshida states, “I think that the very recognition of such a thing (for a State to wage war in legitimate self-defense) is harmful. (applause) It is a notable fact that most modern wars have been waged in the name of the self-defense of States. It seems to me, therefore, that the recognition of the right of self-defense provides the cause for starting a war.” SHŌICHI, *THE BIRTH OF JAPAN’S POSTWAR CONSTITUTION*, *supra* note 4, at 193 (citations omitted).

192. One also wonders whether GHQ would not have communicated its intentions to the Japanese during the Diet debates. Everyone understood that GHQ was monitoring the proceedings very closely. DOWER, *supra* note 4, at 391. Certainly, GHQ would have had ample opportunity to clarify any misunderstandings about the import of Article 9 if it wished to.

the Privy Council and the Emperor), believed it was renouncing the use of force for self-defense, this belief should control.

The problem of determining whose intent controls arises in arguments for a restrictive interpretation of Article 9. Watanabe Osamu argues the Allies' main concern was that Japan never again be a threat to international peace and security. They had failed to prevent Germany from rearming following the First World War, and they were determined to not make the same mistake—Japan should thus never rearm, for any reason.¹⁹³ This argument demonstrates how framing the narrative can have an impact on the result: is it better in some sense to use a broad frame to determine the Occupation authorities' intent about the use of force or to use Iokibe's more narrowly framed account of Kades, Whitney, and MacArthur's purported intent? Moreover, Watanabe and Iokibe's accounts are similar in at least one respect: they focus on American intentions, again raising the question of why the GHQ's aspirations about the use of force are so important to the interpretation of Article 9, particularly if the Japanese had a different understanding of what they were adopting.

Another important part of the "lore" of the drafting history is the possibility of overt and covert intentions. Proponents of the use of force point out that when the final language of Article 9 was hammered out in closed-door negotiations between the GHQ and the Japanese, the drafters agreed to insert the phrase that begins paragraph 2: "in order to accomplish the aim of" paragraph 1. According to proponents of the use of force, the drafters purposefully placed this phrase in the document so when read together with the phrase in paragraph 1 ("[a]spir[ing] sincerely to an international peace based on justice and order"), the "war potential" renounced in paragraph 2 could be interpreted as a capacity for aggressive war that would disturb international peace, not a capacity to engage in self-defense.¹⁹⁴ Furthermore, the argument continues, this somewhat ambiguous language is in the draft precisely to allow for an interpretation in favor of force. This is the so-called Ashida Amendment.

193. House of Councillors CRC Remarks of Experts, *supra* note 5, at 278–79 (remarks of Watanabe Osamu).

194. DOWER, *supra* note 4, at 396. The GHQ draft submitted to the Japanese government provided:

War as a sovereign right of the nation is abolished. The threat or use of force is forever renounced as a means for settling disputes with any other nation.

No army, navy, air force, or other war potential will ever be authorized and no rights of belligerency will ever be conferred by the State.

Government Branch, General Headquarters, Constitution of Japan Art. XIII (Feb. 12, 1946), available at <http://www.ndl.go.jp/constitution/e/shiryo/03/076shoshi.html>.

Ashida Hitoshi, who chaired the House of Representatives subcommittee on constitutional revision, later claimed he had asked for and received permission to make these changes precisely to allow for this interpretation.¹⁹⁵ As discussed earlier, Iokibe argues that the GHQ was complicit in this move.¹⁹⁶

Yamauchi Toshihiro and Ōta Kazuo respond that it does not matter what Ashida thought privately; only his public comments should control. They argue that Ashida never alluded to the possibility of retaining forces for self-defense in his formal remarks before the Diet.¹⁹⁷ They also quote excerpts from stenographic notes of the subcommittee made public in 1995, in which Ashida described his motivation for suggesting the first phrase in paragraph 2 as two-fold: to make the rest of the passage flow better in Japanese and to clarify that Japan's trust in the international system in paragraph 1 made it possible to renounce air and sea forces in paragraph 2.¹⁹⁸

Although competing accounts of the constitutional history persist, the dispute is often over meaning, not facts. The problem of meaning makes it fitting that the interpretive issues surrounding the right to use force in self-defense are often referred to as "theological" problems. The phrase is used somewhat disparagingly to liken the debate on the use of force to metaphysical issues with no resolution.¹⁹⁹ The problem, however, is not restricted to theology; any narrative of a shared social history, even one involving a relatively circumscribed question such as the intentions of drafters regarding the use of force, creates meanings by the mere fact that it is impossible for any one narrative to account for all events. This is so not necessarily because of any ulterior motive, but because narratives are not "designed" to be so inclusive.²⁰⁰ Paradoxically, the simpler the narrative, the harder it is to account for the complexity of events as they unfold; the more nuanced the narrative, the less effective it is in marshalling support for or against a particular position.

195. DOWER, *supra* note 4, at 396.

196. House of Councillors CRC Remarks of Experts, *supra* note 5, at 294 (remarks of Iokibe Matoto). Nishi Osamu argues the Far East Committee was aware the Ashida Amendment could be interpreted as allowing Japan to use force in self-defense. House of Representatives CRC Final Report, *supra* note 1, at 267 (remarks of Nishi Osamu).

197. KENPŌ TO HEIWA SHUGI, *supra* note 18, at 8–9.

198. *Id.* Arai also argues the Ashida Amendment was inserted to strengthen the link between the reliance on the international system and Japan's renunciation of force for any reason, not to create a loophole. ARAI, *supra* note 185, at 44–47.

199. See, e.g., Keidanren Position Paper, *supra* note 115, ch.4 (arguing that the "debate over interpretation of Article 9 has long been 'theological' . . ." and seemingly endless).

200. This, I think, dovetails nicely with Berger's conclusion, in his examination of German and Japanese antimilitarism, that "[i]n the final analysis, German and Japanese antimilitarism can best be explained by each nation's struggle to draw lessons from its troubled past." BERGER, *supra* note 82, at 6.

2. Constitutional Revision or Revolution

In 1953, constitutional scholars Miyazawa Toshiyoshi and Hasegawa Moriyasu discussed whether the Constitution, then eight years old, should be revised.²⁰¹ Asked whether there were limits to what could be changed, Hasegawa responded that at a minimum, no changes could be made that would touch the three principles embodied in the preamble: popular sovereignty, pacifism, and political morality (*seiji dōtoku*).²⁰² Miyazawa agreed that some principles, such as popular sovereignty, were sacrosanct and could not be changed short of revolution, but he disputed that the renunciation of war was untouchable. Since other democracies maintain military forces, he argued, there is no inherent inconsistency between democracy and rearmament.²⁰³ This discussion made clear that although one could agree that a constitution cannot be amended so as to change its fundamental guiding principles, it is difficult, if not impossible, to identify those principles. Further, Miyazawa and Hasegawa did not consider whether such limits exist at all. As a legal matter, why is it not possible for a democracy to choose to make far-reaching changes in its organization under the constitutionally mandated rules for doing so?

These issues have never been fully resolved despite being raised before both the 1957–1964 commission²⁰⁴ and the current commissions. In remarks before the House of Councillors Research Commission, Urabe Noriho argued Article 9 cannot be changed through the normal amendment process. In his view, ordinary amendments to a constitution presuppose the existence of the constitution being amended.²⁰⁵ If, however, the purported amendments damage the constitution's identity (*dōissei*) or continuity (*keizokusei*), then in reality, such changes constitute an annulment of the existing constitution and the establishment of a new one. This cannot happen through the normal amendment process without calling into serious question the legitimacy of both the preexisting constitution and the new one.²⁰⁶

According to Urabe, the proposed changes to the Constitution fall outside of the scope of ordinary amendments in part because Article 9 is

201. *Zadankai: Kenpō wa Kaisei subeki ka Hi ka?* [Symposium: Should the Constitution be Revised or Not?] 1 CHUŌ KŌRON No. 68 (1953) reprinted in *KENPŌ KAISEI SEIRON*, *supra* note 159, at 170.

202. *Id.* at 171.

203. *Id.* at 172–73.

204. JAPAN'S COMMISSION ON THE CONSTITUTION, *supra* note 32, at 345. According to the report, the commission rejected "a stipulation in the present Constitution clearly specifying either limitations or no limitations on amendment." *Id.*

205. House of Councillors CRC Remarks of Experts, *supra* note 5, at 410 (Statement of Urabe Noriho)

206. *Id.*

involved. For Urabe, changing Article 9 to allow the use of force in self-defense, let alone repealing the war renunciation clause, involves changes to not only those provisions but to the very structure of the Constitution itself.²⁰⁷ He rejects claims that changes to paragraph 2 alone would not affect the identity of the Constitution. In his view, paragraph 2 must be read alongside both paragraph 1 and the preamble, which taken together have value as a historical matter and as an example for other world constitutions. Furthermore, any change to paragraph 2 would involve a change to the Japanese commitment to peace, one of the bases of Japan's modern identity.²⁰⁸

Takehana Mitsunori takes the opposite view. For Takehana, nothing limits what can be revised. He makes no distinction between core and non-core constitutional provisions. The people are sovereign, and by definition a sovereign is not restricted. In his view, the establishment of the requirements for amending the Constitution and any substantive amendments are applications of the same sovereignty—as long as the state exercises sovereignty as prescribed by the Constitution, such amendments are legal.²⁰⁹ Takehana is supported in this view by Doi Masakazu,²¹⁰ who uses precommitment concepts in his approach. He begins with social contract theory to explain why people cede authority to governments. At the same time, like Elster and Sunstein, he recognizes people make mistakes through time-inconsistency and other causes.²¹¹ Thus, it is reasonable for the framers of a constitutional system to establish practices beforehand that will enable societies to make well-considered decisions and avoid making hasty ones.²¹² In Doi's view, however, such restraints are not applied blindly; if people critically discern whether amendments address changed circumstances, this is sufficient security for a constitutional system. As long as the change does not involve the locus of sovereignty, Doi argues, the problem of constitutional limits on amendments turns into an issue of whether enough restraints have been put into place to avoid quick decisions, not whether higher-order restraints render immutable some constitutional

207. *Id.* at 413.

208. *Id.* Urabe also argues that the comprehensive nature of the amendments being considered, as well as the possible revision of Article 96 itself, indicates that what is being contemplated is not a revision of the existing Constitution but the establishment of a new one. *Id.* at 413–14. Some of Urabe's views are available in English in Noriho Urabe, *What is Constitutional 'Amendment'?* (Mar. 31, 2004), available at <http://www.jicl.jp/english/related/backnumber/20040331.html>.

209. House of Councillors CRC Remarks of Experts, *supra* note 5, at 414, 415–16 (Statement of Takehana Mitsunori).

210. House of Councillors CRC Remarks of Experts, *supra* note 5, at 419 (Statement of Doi Masakazu).

211. *Id.* at 421.

212. *Id.* at 422.

provisions. For Doi, it is thus legally justified to consider whether Article 9 should be amended to adapt to new circumstances.²¹³

A claim that certain provisions like Article 9 are not subject to amendment because they involve Japan's core national identity has preclusive effect—one could not change Article 9 and still be under the ambit of the current Constitution. The issue of whether or not essential elements of a national identity can be altered without a fresh mandate is one seriously discussed among constitutional scholars.²¹⁴ Under a version of this argument, Sunstein himself argues that a constitution should not allow the right to secession, in part because it contradicts the idea of a deliberative democracy.²¹⁵

In the Japanese context, however, this argument is in danger of swallowing itself. Miyazawa, who was part of the 1953 discussion, is famous for his argument that the 1947 Constitution was really a revolu-

213. *Id.* at 423–24. Arguments like these caused a split among the commission members as to whether or not such limits exist. Those who took the position that there are no limits argued that an opposite view would tie the hands of future generations. Furthermore, although other constitutions do provide that certain sections may not be amended, it should not be concluded that the people of Japan have that intention. Finally, such limitations could make the constitution unresponsive to emergencies. House of Councillors CRC Final Report, *supra* note 1, at 213. Those who took the position that there are limits argued that, at a minimum, Article 96's requirement of a national vote could not be changed. Others, however, argued that even if there were such limits and a constitutional revision breached those limits, the debate might be meaningless as a legal matter because there is no system for invalidating that revision. The limitation debate, however, still has great meaning as a political claim. *Id.*

214. For a discussion of the scholarly debate on this issue in Japan see Akasaka Masahiro, *Kenpōkaisei no Genkai [Limits on Constitutional Revision]*, JURISTO, May 1–15, at 18 (2005).

215. SUNSTEIN, *supra* note 2, at 95–114. Along these lines, Hasebe Yasuo argues in an interesting twist that it is the pacifist interpretation of Article 9 that is antithetical to constitutionalism. Following John Rawls, Hasebe asserts that in a liberal democracy made of people with incommensurable understandings of the good, there must be a line between private and public spheres so persons can pursue their private goals and yet engage in public discourse and reasoning apart from their private worldviews. This preserves a “fragile balance” between one's own views of the good and diverse society. Yasuo Hasebe, *Constitutional Borrowing and Political Theory*, 1 INT'L J. CONST. L. 224, 240 (2003). For Hasebe, “[i]n order to maintain the fragile balance of social collaboration while safeguarding privately held values, the forum of public deliberation must be vigilantly defended from invasion and occupation by any single comprehensive worldview.” *Id.* at 240–41. According to Hasebe, a literal interpretation of Article 9 essentially transforms the provision into such a comprehensive worldview because that interpretation can only be understood as a moral commitment to pacifism. Those who support pacifism are in essence attempting to impose this viewpoint on others in Japanese society. *Id.* at 242. It is not within the scope of this Article to give a thorough response to Hasebe's argument. However, at least one question can be raised. Even if we grant Hasebe's understanding of liberalism, does the Constitution protect a particular political philosophy any more than it protects a particular economic philosophy? It may be that Hasebe's understanding of liberalism is as much a worldview as is a pacifist worldview. The concept of bricolage indicates that it is quite possible for the framers of a constitution to embed not one, but several worldviews in the text, or for subsequent interpreters of the text to use various parts to further a particular worldview.

tionary document disguised as a revision of the Meiji Constitution. Miyazawa observed it was generally accepted among students of the Meiji Constitution that there were limits to what could be revised under that Constitution. The amendments of 1946 transferred national sovereignty from the emperor to the people (in all probability explaining why Doi believes that a change in the locus of sovereignty is an exception to his position that all aspects of a constitution are subject to amendment). In Miyazawa's view, this was so fundamental a change to Japan's national being under the Meiji Constitution that it did not constitute a revision—it was the product of revolution.²¹⁶ Even if it was not Miyazawa's intention, such a critique challenges the legitimacy of the purported amendments of 1946, including Article 9. It is hard to argue a revision that transfers power from the emperor to the people is less fundamental than a revision that determines whether a nation may lawfully use force. Thus, taken to its logical end, an argument that Article 9 is immutable because it is fundamental to the structure or identity of the Japanese state calls into question the legitimacy of that very structure or identity. Of course, one can avoid this conundrum by claiming that all matters in a constitution are open to revision. But while there is always the temptation to make some topics off limits, as Doi and Miyazawa do, this allows others like Hasegawa and Urabe to argue that other issues, like the use of force, should be off limits as well. Such is the nature of conceptual tools.

3. Perennial, Yet Ever-Changing Threats to National Security

Nowhere does the multifunctional nature of heuristics become more apparent than in national security. No one doubts the value of the heuristic tools, both mental and physical, that enable human beings to identify threats and respond to them. In this respect, the “just good enough” quality of such tools is quite good indeed.²¹⁷ At the same time, most acknowledge such tools can be misapplied: a person can see a threat where none exists or mischaracterize the nature of a threat, often with the unintended consequence of creating real threats or magnifying existing

216. *Zadankai: Kenpō wa Kaisei subeki ka Hi ka?*, *supra* note 201, at 171–72; KOSEKI, *supra* note 4, at 124–29. Miyazawa also argued that one of the main weaknesses of the Constitution is that it had not been submitted to the public for consideration and vote. Miyazawa Toshiyoshi, *Kenpōkaisei Mondai no Kangaekata* [Ways of Thinking about the Problem of Constitutional Revision], JURISTO (1955), reprinted in *KENPŌ KAISEI SEIRON*, *supra* note 159, at 156, 159–60.

217. As Balkin puts it, “Not all [conceptual tools are] limiting or distorting for the purpose at hand . . . and not all limitations or distortions are relevant in all contexts” BALKIN, *supra* note 3, at 128.

ones—hence the need for precommitment strategies that try to negate these effects.

The issue is complicated further when a constitution is involved. A constitution provides a democracy's solution, its meta-heuristic, to the question of how society will protect itself, including the precommitment strategies it will use as it does so. If that solution is incorrect or incomplete, with the result of placing a nation's security or other societal values such as civil liberties at risk, the effectiveness and legitimacy of the constitution are called into question.²¹⁸

As a result, the question of whether Article 9 should be amended is complex because it involves at least two related variables. First is the nature of the threats Japan faces and how Japan should respond to them (made even more complex by Japan's reliance on the United States for its defense). Second is the role of Article 9 in enabling such responses. I have already mentioned both issues in Part I; in this section I will be more overt in my application of the framework discussed in Part II.

It would be hard to argue Japan has no threats to its security; a nuclear Korean peninsula, for example, is of grave concern. At the same time, irrespective of the substantive merits for increased military capability, this argument (that Japan's security needs demand a military force and Article 9 should therefore be interpreted or amended to allow it to have one) is not new. Because the argument has been heard before, it is attenuated by the way in which it has been used and altered in the past and by the associations those prior uses bring with them. This requires the deliberative groups in Japan to determine whether the argument reflects society's best judgment about Japan's security needs or is being put to other uses—not necessarily nefarious uses, but different uses nonetheless.

First, the identity of the threat has changed over time. During the Cold War, the threat was communism or the arms race.²¹⁹ Immediately after the end of the Cold War, the threat was the instability caused by the breakdown in the bipolar order, particularly regional and ethnic con-

218. Elster writes, "*If the framers try to prevent the constitution from becoming a suicide pact, it may lose its efficacy as a suicide prevention device.*" ELSTER, *supra* note 2, at 174 (emphasis in original).

219. For example, the following statement was made at a regional hearing held by the 1957–1964 Constitutional Research Commission:

At a time when we are being threatened by an external force which would deny us the rights and freedoms recognized in the Constitution of Japan, enjoyed equally by all the people, and which aims to establish a despotism, we certainly possess the right to exercise the right of self-defense and to defend with all determination this Constitution which guarantees the rights and freedoms of the people.

JAPAN'S COMMISSION ON THE CONSTITUTION, *supra* note 32, at 196.

flict.²²⁰ Currently, it is terrorism and asymmetric warfare.²²¹ Each of these threats may be real and significant, but the question arises as to what extent the logic driving the security argument almost requires the selection of a threat to complete its narrative.

Second, the security argument is one of several interrelated arguments made in favor of changes to Article 9. The debate has also been couched in terms of what is appropriate for a state: why should Japan, as an independent country, be prohibited from defending itself? This question is a precursor to the contemporary argument that Japan should have a defense system concomitant with a great economic power with a larger role to play in international affairs.²²² In addition, as discussed earlier, there is the argument that Article 9 was forced on Japan.²²³ Since these arguments often appear together, the question arises as to how important the security issue is in relation to others. Does national security form the heart of the case for amending Article 9, or is it ancillary to that case?

Third, recall that Japan's decision to rearm in the 1950s was due in large part to strong pressure from the United States, which had just forced Japan to disarm.²²⁴ The United States made American bases in Japan and the establishment of the National Police Force preconditions for ending the Occupation, and it had a great interest in domestic developments in post-Occupation Japan. Dower describes the U.S. policy towards Japan just before its restoration of sovereignty as follows:

(1) to discredit the Japanese left—and the strong movement for an “over-all peace” based on no rearmament, no American bases, and Japanese neutrality in the cold war . . . (2) to eradicate the strong commitment to pacifism . . . which prevailed among the Japanese populace at large . . . (3) to woo the Japanese to the capitalist camp by stressing their ‘social superiority’ to other Asians . . . (4) to accomplish these goals of

220. See e.g. *Remarks Before the House of Councillors Constitutional Research Commission* (June 4, 2004)(statement of Hatakeyama Keichi) in *Sangiin Kenpō Chōsakai ni okeru Kōjutsunin nado Kichō Hatsugen* [Basic Statements of Members of the Public and the like of the House of Councillors Constitutional Research Commission], at 80–81 (discussing post-Cold War threats to peace and security, including ethnic conflict and terrorism).

221. Sasajima Masahiko, *Jiei no tame no Guntai no Hochi o Meiki* [Make Clear the Maintenance of a Military for Self-Defense], in *YOMIURI SHIAN 2004NEN*, *supra* note 116, at 74.

222. KENPŌ “KAISEI” NO SŌTEN, *supra* note 17, at 21–22 (arguing that in the 1990s, proponents of amendments used Japan's status as an economic power to justify a larger military).

223. See *supra* text accompanying notes 177–186.

224. See BURUMA, *supra* note 183, at 156–58 (describing U.S. pressure on Japan to rearm).

re-education, or reorientation, by developing appropriate 'psychological programs'²²⁵

Later, Japan was also meant to serve as a democratic counter-example to communist China.²²⁶ This U.S. influence caused critics of Japan's defense policy in the 1950s and 1960s to argue the decision to rearm was based not so much on an objective assessment of Japan's security needs as it was on outside pressure.²²⁷

Fourth, in the early years of the Constitution, there was a genuine concern that Japan would return to its former militarism, which had proved disastrous to itself and its neighbors.²²⁸ Arguments based on national security and appeals to nationalism had been used to justify Japanese military development and expansion in Asia throughout Japan's transformation into a modern state. For example, Yamagata Arimoto, the first prime minister of Japan after the establishment of the National Diet, argued in 1890 that "a nation without a plan of self-defense was not a proper nation."²²⁹ This argument, as I discussed earlier, is used today. For Yamagata, that plan included securing interests outside of Japan, particularly in Korea. "[Yamagata] talked about security, but the rationale of security . . . led him to say there could be no defense without the powers of offense, to support forceful actions in regions outside of Japan's boundaries, and constantly to broaden the perimeter of these actions."²³⁰ The security argument thus evokes past government policies that blurred the lines between defensive and offensive war, policies that led to Japan's almost total destruction.

Finally, assuming Japan does in fact face significant threats to its security, the issue still remains as to whether Article 9 should be amended to allow Japan to respond to them. So far I have discussed these issues as if the question of rearmament is open. Although some

225. John W. Dower, *E.H. Norman, Japan and the Uses of History*, in *ORIGINS OF THE MODERN JAPANESE STATE: SELECTED WRITINGS OF E.H. NORMAN* 3, 41 (John W. Dower ed., 1975).

226. See *id.*

227. See, e.g. Kenpōyōgo Kokumin Rengō [Citizen's Union for the Protection of the Constitution], 'Kenpōyōgo Kokumin Rengō' Kessei Taikai Sengen, Yōkō, Kiyaku ['Citizen's Union for the Protection of the Constitution' Founding Convention Declaration, Outlines, Rules] in *KENPŌ "KAISEI"* No SŌTEN, *supra* note 17, at 486 (arguing that the Japanese government is being forced by "international pressure" from a particular sector (i.e., the United States) to rearm). In the late 1970s, U.S. pressure on Japan after the Soviet invasion of Afghanistan led to stronger military ties between the two countries. BERGER, *supra* note 82, at 130-31.

228. See, e.g., Kenpōyōgo Kokumin Rengō, *supra* note 227.

229. Marlene Mayo, *Attitudes Towards Asia and the Beginnings of Japanese Empire* reprinted in 1 *THE JAPAN READER: IMPERIAL JAPAN: 1800-1945* 212, 215 (Jon Livingston, Joe Moore, and Felicia Oldfeather eds., Random House 1973).

230. *Id.* at 216.

want Japan to dismantle the SDF, a significant number of deliberative groups accept, at least tacitly, both Japan's right to defend itself and the SDF's existence. But as Hirose Yoshio observes, the decision to rearm and allow the United States to maintain bases in Japan, and to interpret Article 9 to permit this without repealing it completely, represented a compromise among competing forces. On the one hand, the United States pressured Japan to rearm, and on the other, Japan desired to focus on economic development, the Japanese people widely accepted pacifism, and Australia and New Zealand were concerned about a rearmed Japan.²³¹ Hirose notes that the solution reached in the 1950s was just good enough to balance these competing forces and to enable Japan to pursue its policy of economic development. At the same time, this compromise also led to overdependence on the United States and invited the current problem of American bases in Okinawa, as well as what Hirose describes as a rift between the Japanese leadership and the people.²³²

Article 9 has not only played a role in the rough equilibrium that has persisted thus far, but it has also affected Japan's understanding of national security. Japan has relied on the United States for its defense, but with regard to positive national security initiatives, it has had to rely on non-military action. Katzenstein observes that Japan's understanding of national security is a comprehensive one and includes an emphasis on diplomatic relations, trade relationships, assistance to developing countries, and humanitarian assistance.²³³ This broader understanding is borne out by the statements of all major deliberative groups, as well as the findings of the constitutional research commissions. Keidanren, for example, supports amendments to Article 9 but also argues that because Japan lacks natural resources, it is important for the nation's well-being for it to use diplomatic and economic means to achieve international peace and stability. The organization thus supports free trade agreements with Japan's Asian neighbors as well as other economic ties.²³⁴

In turn, Article 9 and Japanese conceptions of national security affect the very security situation Japan faces. Theodore McNelley, writing

231. HIROSE YOSHIO, *NIHON NO ANZENHOSHŌ TO SHINSEKAI CHITSUJŌ* [Japanese Way for International Security and a New World Order] 181–83 (1997).

232. *Id.* at 182–83.

233. KATZENSTEIN, *supra* note 12, at 3. (“[T]he Japanese definition of security goes far beyond what American police or military officials would recognize. Japanese officials define internal and external security in comprehensive terms. They emphasize the social, economic, and political aspects of security rather than focus more narrowly on explicitly coercive dimensions of state policy.”). See also Okada, *supra* note 130, at 5–7, 15–18 (discussion by the president of Minshūtō of the need for a comprehensive approach to Japanese security); JAPANESE FOREIGN POLICY IN ASIA AND THE PACIFIC (Akitoshi Miyashita & Yoichiro Sato eds., 2001) (a collection of essays describing Japan's trade, economic, and assistance policies and their relationship to foreign policy).

234. Keidanren Position Paper, *supra* note 115, § 2.

in the early 1960s, recognized that Article 9 can have a two-fold effect on world peace and security. On the one hand, it can prevent Japan from reemerging as a military threat; on the other, it can invite other countries to threaten Japan.

If Article 9 helps to prevent the recrudescence of irresponsible militarism in Japan, it will have made a positive contribution to world peace. On the other hand, if it prevents the development of the defense forces necessary to deter aggression it may ultimately prove to have served the cause of war rather than that of peace.²³⁵

Thus far, Article 9 and all of its resulting compromises have preserved the peace. In addition, although other nations continue to hark back to Japanese expansionism, they have come to assume that Article 9 represents and affects the long term security policy of Japan, which in turn has had an impact on how these countries have framed their security policies. This result reflects the recursive nature of social tools.

The issue now arises as to whether the rough equilibrium that Article 9 had a role in creating has changed so much that Japan's understanding of national security and Article 9 itself should change. The answer is not obvious; constitutional provisions governing Japanese national security will always need to balance domestic priorities, the demands of the United States, and the worries of Japan's neighbors. Article 9 and Japanese attitudes towards security have helped Japan perform that balancing act thus far; the question is whether better tools are available.

D. Incompletely Theorized Agreement and the Imperfections Thereof

Bricolage in a substantive debate on history, constitutional change, and national security creates difficulties in achieving consensus. The issue remains, however, as to whether the same array of concepts can be used to reach incompletely theorized agreement. As discussed earlier, it seems there is agreement in the Article 9 debate on relatively high levels of abstraction. All groups believe the renunciation of war contained in paragraph 1 is a core value to Japanese society, one that has been deeply internalized and institutionalized. The result has been a more comprehensive understanding of national security objectives that encompasses economic and diplomatic relations in addition to military strength. And, while it encounters opposition, there seems to be a growing consensus that Japan either already has or should have the right to use force to de-

235. Theodore McNelly, *The Renunciation of War in the Japanese Constitution*, 77 POL. SCI. Q. 350, 378 (1962).

fend itself. Can consensus on this high level help smooth over disagreements about history, about what can be revised in a constitution, about what Article 9 says or should say, or about what national security means?

Even those who agree Japan has the right to use force in its defense disagree on whether Article 9 should be amended to confirm this right. On the one hand, a group opposing amendments to Article 9 in the belief that it already permits the use of force might support an alteration if it expects doing so would quell any remaining doubts about the issue, thus enhancing the legitimacy of the Constitution, Japan's national security policy, and the SDF. It might also agree to do so out of concerns that deliberative groups interpreting Article 9 restrictively will gain more political power in the future. On the other hand, a group that advocates amending Article 9 might acquiesce in a decision not to do so as a result of two beliefs: first, that the current round of debates (over a protracted amount of time) has solidified current policy, and second, that groups opposing force and the SDF are on the wane for the foreseeable future.

It is hard to imagine how incompletely theorized agreement can be reached between groups that advocate the use of force in self-defense by the SDF and those that oppose such force. As discussed earlier, when the now defunct JSP formed a coalition government with the LDP in the 1990s, it softened its position on the SDF by calling for gradual instead of immediate reductions. Perhaps a similar solution will present itself here. Or, it may be that left-idealist views are held by so few groups with political power it will be deemed sufficient that the minority position has been heard at all.²³⁶

Any solution eventually reached will resolve some issues and create others. One possible solution is to do nothing—it is possible no revisions will result from the current debates, either because of changes in the Diet or because public opinion has not yet galvanized in favor of amendments. This would mean the government's interpretation of Article 9, including the principle of minimum necessary force, would control for the foreseeable future. This outcome would in turn have the effect of justifying the existence of the SDF while leaving open the

236. There is subtle evidence of this even in the House of Councillors Constitutional Research Commission Final Report. According to the Explanatory Notes, the Final Report uses a system of underlining and reverse shading to indicate the level of support among the political parties for a particular position. Positions on which the five parties agree are indicated in bold underlining throughout the text. However, there are also methods of describing the level of support for issues without taking into account the left-centrist Japanese Communist and Social Democratic Parties. Positions on which the LDP, Minshuto and the New Komeito largely agree are indicated in reverse-shading, and issues on which these three parties are divided are indicated by regular underlining. House of Councillors CRC Final Report, *supra* note 1, Explanatory Notes (no pagination in original).

question of its participation in UN peacekeeping operations and prohibiting Japan from engaging in collective self-defense.

What the preservation of the status quo would indicate about constitutionalism in Japan is ambiguous. On the one hand, it would allow those who disagree with the government's interpretation of Article 9 to argue it has rendered the Constitution an empty shell. That argument has some traction. One cannot help but notice the jury-rigged feel of the concept of minimum necessary force, so critical to the government's interpretation of Article 9. First, it is circular. "[W]ar potential" prohibited in paragraph 2 is defined by fiat as the use of force that rises above a level minimally necessary for self-defense. Since, in the government's view, the SDF is never to use force rising above that level, it does not constitute "war potential" even though it consists of land, air, and sea forces and in reality has the capacity to project force rising far above the minimal level. Second, under certain circumstances, the principle would justify maintaining very large military forces if the threat to Japan were large enough. The circular and ephemeral nature of minimum necessary force as a concept and as a substantive limit on the use of force lends credence to a more restrictive interpretation of Article 9 and raises the question of how effective the Constitution is in constraining the government.

These conceptual problems in the official interpretation of Article 9 lead some to worry about the public's perception of the government's security policies and the Constitution. Eto Jun, in a 1983 NHK broadcast on the Constitution, was critical of what the government's interpretation meant to the person on the street:

[The government's position that the SDF is not a force with war potential means] although . . . a person wearing a steel helmet, carrying a gun, and marching in step looks like a soldier, in reality he is not—he is SDF personnel, that is, just like a mail carrier or public works bureau employee. A bureaucrat or legal specialist might understand why one must describe [SDF personnel] in this way or why one should think in this way, but common people will not. The resulting perception of confusion, or feeling of dissonance (*kokoro no sukkiri no nai*) is, I think, a huge minus no matter how one values [Article 9].²³⁷

This conflict between common-sense understandings of Article 9 and the official position resonates with Hirose's concern, discussed ear-

237. SHUZO HAYASHI ET AL., *KENPŌ RONSŌ* [Constitutional Controversies] 50–51 (2005).

lier, that historically there has been a rift between the public and the government on matters of self-defense.²³⁸

On the other hand, despite the difficulties raised by the official interpretation of Article 9, the concept of minimum self-defense has not been ineffective as a limit. To state the obvious, Japan has not engaged in an offensive war since World War II.²³⁹ But even on a more technical and doctrinal level, the government has been fairly consistent in its approach to Article 9. Yutaka Kawashima makes the following observations about the legal debate on Article 9:

[T]he government is expected to maintain the legal consistency of all the answers it has given in past parliamentary debates For example, in [the] parliamentary debate about the interpretation of the security treaty between Japan and the United States, responses of government officials some forty years ago have to be quoted and adhered to.²⁴⁰

Even if the Japanese judiciary had determined that it was appropriate to be more active in the interpretation of Article 9, it is not obvious that the courts would have achieved a significantly greater level of consistency or cohesion in its jurisprudence than the government has achieved over the 60-year history of the article.

What about the fact that there is more than one plausible interpretation of Article 9? There are costs—looming over government policy is the possibility that it is in violation of the Constitution, which calls into question both the legitimacy of the policy and the ability of the Constitution to control government action. Yet, as David Engdahl argues, the lack of definitive interpretations of constitutional provisions sometimes has rhetorical, educative, and ultimately legitimating potential in civil

238. See *supra* text accompanying note 231.

239. As Yamauchi argues, Japan has not waged war since World War II, whereas under the Meiji Constitution, Japan was engaged in a war approximately every 10 years. Yamauchi, *supra* note 11, at 39–40. Even absent judiciary input, the balance of powers has had an impact on the executive's application of Article 9. Lori Damrosch argues that the Japanese legislature and its interpretation of Article 9 have served as a powerful brake on the executive branch's war powers. Lori Fisler Damrosch, *Constitutional Control Over War Powers: A Common Core of Accountability in Democratic Societies?* 50 U. MIAMI L. REV. 181, 196 (1995). As evidence, she points to the serious debates in the Diet in the early 1990s concerning Japan's participation in the first Persian Gulf War and in the United Nations peacekeeping operations in Cambodia. She argues that such debates resulted in legislation "that both enabled and constrained Japanese involvement in UN peacekeeping . . ." *Id.* at 193–94.

240. KAWASHIMA, *supra* note 21, at 8 (2003). For a detailed discussion of the relative consistency of the government's interpretation and application of Article 9, in large part because of the work of the Cabinet Legislation Bureau, see John O. Haley, *Waging War: Japan's Constitutional Constraints* (Oct. 2, 2003) (unpublished manuscript, available at <http://law.wustl.edu/Faculty/workingpapers/haley/wagingwar.pdf>).

society. Ambiguities have the ability to sway precisely because of multiple interpretations.²⁴¹ As discussed earlier, this has been true of Article 9, as each successive debate over its merits serves to review and ingrain the values and policies associated with it.²⁴² Even the courts have a role in this regard. John Haley argues that although it is unlikely that the courts will ever overturn national defense legislation, litigation is used as a form of political action to marshal opposition to the SDF or to call into question its legitimacy.²⁴³ The result has been the rough accommodation that Engdahl advocates.²⁴⁴

To the extent any amendments are made, the war renunciation provision of paragraph 1 will remain, and paragraph 2 will be amended to confirm the constitutionality of both the right to use force for self-defense and the SDF. It is also possible that participation in UN peacekeeping operations will be confirmed. This approach, if taken, would codify existing Japanese defense policy and practice, confirming the constitutionality of the SDF and possibly Japanese military participation in UN peacekeeping activities.²⁴⁵ Such a limited approach has several advantages. From a domestic perspective, these changes would allow Japan to maintain, to a large extent, the values and policies embodied in Article 9, ideals that have enjoyed broad acceptance by Japanese society. The Constitution would retain provisions that renounce offensive warfare as an instrument of foreign policy. In response to the assertion that Japan continues to rely on the international community for its security, such provisions could retain, indeed codify, the principle of minimum necessary force, continuing the government's 50-year old interpretation. At the same time, such changes would accommodate more recent developments in Japan's security needs vis-à-vis North Korea and China and reflect and reinforce Japan's changing self-image as a major

241. David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 337 n.205 (1992).

242. See *supra* text accompanying notes 185–186.

243. HALEY, *supra* note 73, at 188–89.

244. See *supra* note 241. This rough accommodation is also evidence of incompletely theorized agreement on defense matters.

245. As discussed earlier, *supra* text accompanying notes 19–31, the question of collective self-defense, particularly with respect to Japan's relationship with the United States under the US-Japan Mutual Security Agreement remains open. Unless specific limits are put in place, either in the Constitution, the U.S.-Japan Mutual Security Agreement, or in its guidelines, a revised provision that confirms the constitutionality of Japanese military activities under the U.S.-Japan security umbrella could open the door to a significant expansion of those activities. As discussed, under the most recent Guidelines for U.S.-Japan Defense Cooperation issued in 1997, Japan is already given wider latitude as to where it may engage in military activities, although such activities are limited in nature. Moreover, as the United States' definition of permissible acts of self-defense broadens to include preemptive self-defense, so too Japan may be called on to increase its participation in such activities, and it will no longer be able to use the Constitution as a means of saying no.

international actor. Furthermore, since Japan has to a large extent accommodated itself to the SDF and the U.S. security umbrella, amendments that merely serve to codify the status quo should raise fewer concerns about legitimacy.

A limited approach would also have advantages from an international perspective. If Japan wants to address the concerns of its neighbors while resolving some of its existing constitutional quandaries, codifying current practice would appear to be better than repealing Article 9 altogether. Japan's current defense policy is already known to other states and has undoubtedly been factored into their defense policies and war plans. This approach is preferable to forcing states to predict how Japan might act based on more open constitutional provisions.

At the same time, a limited approach raises at least three concerns. First, an acknowledgement that Japan can use force for self-defense will require additional safeguards to ensure force is used appropriately. At present, the Constitution provides that the Cabinet Ministers of State must be civilians²⁴⁶ but does not set out specific procedures for permitting the use of force. (In the minds of some, this fact supports an argument that Article 9 prohibits the use of force for even self-defense.) Instead, the Self-Defense Force Law governs decisions to authorize force.²⁴⁷ Since most of these procedures are set out in legislation, one issue to be resolved is whether provisions governing the use of force should be written into the Constitution.²⁴⁸

The second issue is whether a provision that both affirms and limits Japan's right to use force for self-defense would be meaningful. On the one hand, some want the principle of minimum necessary force codified in the Constitution. As discussed earlier, the concept has been criticized

246. KENPŌ, art. 66, para. 2.

247. Jieitai Hō [Self-Defense Force Law], Law No. 165 of 1954, arts. 7–9. Under Article 41 of the Constitution, the Diet is the highest organ of state power. Kenpō, *supra* note 6, art. 41. Executive power is vested in the Cabinet, which is headed by the Prime Minister. *Id.* art. 65–66. The Cabinet is collectively responsible to the Diet. *Id.* art. 66. Under the current command structure established by statute, the Defense Agency is a part of the Office of the Prime Minister. The head of the Defense Agency, the Director General, has the status of minister of state. She is directly under the control of the Prime Minister. The Director General is the head of the SDF, as well as two other “civilian” arms of the agency, consisting of various internal bureaus and the Defense Facilities Administration. Japan Defense Agency, Outline of Defense Agency and SDF, at http://www.jda.go.jp/e/index_.htm (last visited Oct. 3, 2005); Global Security.org. *supra* note 13. In emergencies, the Prime Minister is authorized to deploy the SDF, subject to approval of the Diet. Such approval can be retroactive. *Id.* As a means of maintaining civilian control over the armed forces, heads of important internal bureaus such as defense policy, budget, and equipment are often headed by civilians from other government ministries. *Id.*

248. For a discussion of the international community's interest in constitutional provisions that govern the use of force, see Lori Fisler Damrosch, *Constitutional Control Of Military Actions: A Comparative Dimension*, 85 AM. J. INT'L L. 92 (1991).

for its circularity and for potentially justifying significant levels of force. On the other hand, flawed as the principle is, codification in the Constitution would enhance its legitimacy. Furthermore, it would be inaccurate to say that the concept has no value as a restraint: first, as discussed earlier, the Diet has required successive administrations to remain consistent in their interpretation and application of Article 9, and second, minimum self-defense, according to the government, does not allow Japan to engage in collective self-defense.

The third issue is whether, down the line, a limited approach would simply give rise to the same kind of constitutional issues that plague Article 9 now. Limited revisions might satisfactorily address the current issues regarding the SDF, participation in peacekeeping operations, and even collective self-defense, but they may not anticipate unforeseen challenges to Japan's security and its international relations. As Japan responds to those challenges, it could find itself hampered by constitutional provisions meant to address earlier situations. If Japan's past experience with Article 9 is any indication of future behavior, it may well adopt policies that again raise constitutional issues. Although it is possible the current focus on revisions to the Constitution marks a new trend in Japanese constitutionalism in which revisions will be made more often, it is more likely that new revisions to the Constitution will be long in coming. The result would be yet another debate about the constitutionality of Japan's defense practices under the revised Constitution.

At present, it seems a complete repeal of Article 9 is unlikely. Nevertheless, it would have the advantages of addressing the current issues raised by Article 9 and avoiding similar constitutional issues that could arise with more limited revisions. As discussed earlier, however, although Japanese public opinion towards defense matters has shifted somewhat in the recent past, a substantial portion of the Japanese public continues to embrace the values embodied in Article 9. It could be argued such values will persist even if the Constitution does not directly renounce the use of force, particularly since such ideals would likely remain embodied in the preamble. Regardless, the repeal of the renunciation of war would have great symbolic impact, and it is unclear that a complete repeal would garner the required two-thirds vote in both houses of the Diet and a majority vote in a referendum approving such a measure. Finally, although complete repeal would free Japan to become a more active participant in its security relationship with the United States without the difficulties of accommodating that relationship with more limited amendments, Japan's neighbors, notably China, Russia,

and North and South Korea, would be more alarmed by a complete repeal than by a limited one.²⁴⁹

V. CONCLUSIONS

In *Japanese Law*,²⁵⁰ Mark Ramseyer and Minoru Nakazato try to explain various facets of Japanese law by examining the ways in which Japanese people, faced with specific economic and social needs, have found rational solutions to those challenges. They imply that it is misleading to try to identify a common thread that runs through all of Japanese law.²⁵¹ The idea that Japanese law and its role in wider Japanese society cannot be reduced to a few generalizations has been widely accepted. Scholars like Frank Upham, for example, have debunked the myth of Japanese aversion to litigation.²⁵² Like any modern society, Japan attempts to address a number of social issues; law is one strategy to deal with them—on the individual level, through the various laws and practices that regulate family and economic life, as well as on a broader societal level. At the same time, other scholars observe how Japan has used law as an ordering principle in ways that have persisted over time. Thus, Haley, fully aware of the dangers of lapsing into arguments for Japanese exceptionalism,²⁵³ can nevertheless trace through Japan's history the pattern in which Japanese elites have separated the institutions of authority and power.²⁵⁴ He also observes a distinct but not unique way of obtaining consensus to legitimate policy decisions.²⁵⁵ So too have other scholars described the particular ways in which Japan has both accepted and transmuted the concept of civil rights.²⁵⁶

249. Japan could declare it is not permitted to use force even in self-defense, but this does not seem likely. In addition, some have argued Japan should declare permanent neutrality. See e.g. *House of Councillors CRC Remarks of Experts*, *supra* note 5, at 294 (remarks of Ueda Katsumi).

250. J. MARK RAMSEYER & MINORU NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH* (1999).

251. *Id.* at xi.

252. FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* (1987). Upham shows litigation has been used in Japan to address important social issues, such as environmental protection, employment, and civil rights. At the same time, when some issues, such as the environment are involved, private actions have been largely subsumed by administrative responses to those issues, in large part, so the government can continue to exercise control over them.

253. HALEY, *supra* note 81, at xv.

254. HALEY, *supra* note 73.

255. HALEY, *supra* note 81, at 16–17.

256. See, e.g., Ronald J. Krotoszynski, Jr., *The Chrysanthemum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression*, 1998 Wis. L. REV. 905 (1998); Christopher A. Ford, *The Indigenization of Constitutionalism in the Japanese Experience*, 28 CASE W. RES. J. INT'L L. 3 (1996); Beer, *supra* note 174.

My examination of Article 9 in the light of the work of Elster, Sunstein, Balkin, and others suggests one should not be surprised to observe a set of solutions to societal issues that is both compatible with any number of cultures and a distinct collection of repertoires and concepts used to achieve consensus among the various deliberative groups influential in national policy decisions. This has been the case with Article 9: the various deliberative groups and their particular positions on the article, the use of the constitutional research commissions as a preliminary stage in the deliberation process, and the nature of the substantive arguments for and against amendments to the article demonstrate the work of bricolage that impacts all institutional and conceptual tools.

I have also shown how the narratives and concepts that form part of the debate make consensus challenging. From the process thus far, however, Japanese society appears to recognize agreement on relatively high levels of abstraction concerning Japan's commitment to peace, the need for Japan to be able to defend itself (although there is a significant dissenting view), and its understanding of national security. The question is whether agreement on this abstract level will enable the various groups in Japan to compromise on other more contentious issues, such as whether Article 9 needs to be amended or simply reinterpreted and whether Japan should be able to exercise the right to collective self-defense. Irrespective of the final outcome, the Japanese experience provides an important example of how a democracy uses its constitution as a means of self-governance and consent.